TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 903.

[redacted] A CORPORATION, APPELLANT,

vs.

[redacted] U. S. DISTRICT ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, AND [redacted] ASSISTANT, ACTING AND DEPUTY COMMISSIONER OF IMMIGRATION OF THE PORT OF NEW YORK.

APPEAL FROM THE [redacted] COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

(27,358)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 603.

JACOB RUPPERT, A CORPORATION, APPELLANT,

vs.

FRANCIS G. CAFFEY, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, AND RICHARD J. McELLIGOTT, ACTING AND DEPUTY COLLECTOR OF INTERNAL REVENUE OF THE THIRD DISTRICT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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Equity Subpœna.

The President of the United States of America to Francis G. Caffey, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Jacob Ruppert, a corporation, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of two hundred and fifty dollars ($250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 30th day of October, in the year one thousand nine hundred and nineteen and of the Independence of the United States of America the one hundred and forty-fourth.

ALEX. GILCHRIST, JR.,
Clerk.

ROOT, CLARK, BUCKNER & HOWLAND,
FITCH & GRANT,
Sol's Complainants.

The defendants are required to file their answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX GILCHRIST, JR.,
Clerk.

Endorsed.

2 I hereby Certify that on the 30th day of October, 1919, at the City of New York in my district, I personaliy served the within subpœna in equity upon the within named Defendant, Francis G. Caffey, United States Attorney for the Southern District of N. Y., at Post Office Building, N. Y. C., N. Y., by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,
United States Marshal,
Southern District of New York.

Dated, October 31, 1919.

I hereby certify that on the 30th day of October, 1919, at the City of New York, in my district, I personally served the within named defendant Richard J. McElligott, Acting & Deputy Collector of Internal Revenue of the Third Dist. of N. Y., at 28 W. 23d St., N. Y. C., N. Y., by exhibiting to him the within original and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,
United States Marshal,
Southern District of New York.

Dated, October 31, 1919.

U. S. District Court, S. D. of N. Y. Filed Oct. 31, 1919.

3 District Court of the United States, Southern District of New York.

In Equity.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney, etc., and RICHARD J. McELLIGOTT, Acting and Deputy Collector of Internal Revenue, etc., Defendants.

Bill of Complaint.

Root, Clark, Buckner & Howland, 31 Nassau Street, New York City, and
Fitch & Grant, 32 Nassau Street, New York City,
Solicitors for complainant.

Elihu Root, William D. Guthrie, William L. Marbury, of counsel for complainant.

4 District Court of the United States, Southern District of New York.

In Equity.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, sitting in Equity:

The complainant, Jacob Ruppert, a corporation, brings this, its bill of complaint, against the above-named defendants, and respectfully shows unto this Honorable Court as follows:

I. The complainant, Jacob Ruppert, is a corporation organized and existing under the laws of the State of New York, and its principal place of business is located in the city and county of New York in said State. All of its officers, directors and stockholders are citizens of the United States by birth. The defendant, Francis G. Caffey, is the duly appointed and acting United States Attorney in and for the Southern District of New York, and the defendant, Richard J. McElligott, is the Acting and Deputy Collector of Internal Revenue in and for the Third District of New York.

5 II. This is a suit of a civil nature arising under the Constitution of the United States. The matter in controversy exceeds the sum of three thousand dollars ($3,000) in value, exclusive of interest and costs. The complainant is advised by its counsel and therefore avers that subdivision "Fourth" of section 1 of the act of Congress of November 21, 1918, providing for so-called war prohibition, and title I of the act of Congress of October 28, 1919, duly called and known as the "National Prohibition Act," are unconstitutional and void because beyond the powers vested in the Congress, in that they seek to provide for and enforce national prohibition of malt liquors during the period which will elapse before the Eighteenth Article of Amendment to the Constitution of the United States will become effective for any purpose whatever, as therein expressly provided, and thereby deprive the complainant of its liberty and property without due process of law and without just compensation, and in that, therefore, they violate both the Fifth and Tenth Articles of Amendment to the Constitution of the United States.

III. The complainant was incorporated in 1910 as a manufacturing corporation for the purpose of carrying on and conducting the business of manufacturing and brewing lager beer and other malt liquors and of doing such other business as might be necessary, incidental, or convenient for the operation of the business of such manufacture and the sale of its products. It succeeded to the extensive and valuable business of and the property theretofore used therein by one Jacob Ruppert and the good-will established by him from about the year 1867, at which time he
6 entered upon said business of brewing, manufacturing, producing and selling malt liquors, until about 1910, when he transferred the said business and property to the complainant corporation, which has ever since owned, managed, carried on and conducted said business. The complainant has a capital stock of the par value of one hundred thousand dollars ($100,000), divided into one thousand (1,000) shares of the par value of one hundred dollars ($100) each, all of which stock has been duly issued for full value and is now outstanding.

IV. The complainant further alleges as follows:

(1) That, in addition to other valuable real estate, it owns three plots of real estate comprising sixty-five (65) lots in the City of New York which are used by it solely for the purpose of its aforesaid brewery business, and that these plots of real estate have an aggregate assessed valuation of over one million, eight hundred and forty thousand dollars ($1,840,000).

(2) That, after allowing for depreciation and exclusive of buildings, the present book value of its fixtures, plant and other personal property used in its said business is in excess of ten million, seven hundred thousand dollars ($10,700,000), and that such personal property comprises, among other things, machinery, wagons, trucks, leases, chattel mortgages, real estate mortgages, horses, office furniture, fixtures, stock and supplies on hand and accounts receivable, the latter aggregating several hundred thousand dollars in value.

7 (3) That it is now and since the year 1910 has been actively engaged in manufacturing and selling large quantities of malt liquors; that the business thus conducted by it amounted in 1916, 1917 and 1918 to over six million dollars ($6,000,000), eight million dollars ($8,000,000) and ten million dollars ($10,000,000), respectively, and that its good-will was then of large and growing value and exceeding one million dollars ($1,000,000) in value and earning capacity.

(4) That is has during the last three years sold its ware to about four thousand (4,000) customers each year, and that during said period its yearly sales of beer manufactured by it were approximately as follows:

Year.	Barrels.
1916	1,105,000
1917	1,206,000
1918	904,000

(5) That it employs in its said business over seven hundred (700) men with a total monthly payroll of approximately eighty-eight thousand dollars ($88,000) and that the great majority of them are highly trained and skilled workmen.

(6) That, during the three years from 1916 to 1918, both inclusive, it paid approximately the following sums as taxes and license fees to the following governmental authorities, including advances for account of its customers to be repaid to it by the latter, to wit:

Year.	United States internal revenue taxes.	State and City of New York taxes.
1916	$1,664,000	$879,000
1917	2,189,000	822,000
1918	2,715,000	505,000

8 (7) That the average net profits of its business during the three years from 1916 to 1918, both inclusive, were in excess of one million dollars ($1,000,000) per annum.

(8) That, as required by statute of Congress in such case made and provided and by the Internal Revenue Regulations, complainant has duly given and filed a brewer's bond in the penal sum of one million, three hundred and fifty thousand dollars ($1,350,000), binding it faithfully to comply with all the requirements of law relating to the manufacture and sale of malt liquors.

V. Prior to the enactment and approval of the act of Congress of August 10, 1917, entitled "An Act to provide further for the national security and defense by encouraging production, conserving the supply, and controlling the distribution of food products and fuel," and the making and promulgation of a certain proclamation by the President thereunder, dated December 8, 1917, to which reference is hereby prayed for its terms and provisions, the complainant manufactured and sold for beverage purposes fermented malt liquors which were known as and commercially called "larger beer" and which contained about four per cent. of alcohol by weight, being equal to about five per cent. by volume, the weight of alcohol being approximately one-fifth less than the volume and the ratio of weight to volume being as 4 is to 5. But since January 1, 1918, the complainant has discontinued the manufacture and sale of the beer theretofore manu-

9 factured and sold by it and from said date has in all things strictly conformed to the proclamations of the President under said act of Congress and has produced, manufactured and sold no malt liquor containing to exceed two and three-quarters per cent. (2.75 p. c.) of alcohol by weight; and all and singular the malt liquor

so produced, manufactured and sold by it since January 1, 1918, and sold by it for beverage purposes, was and is known as and commercially called "war beer," and contained and still contains less than 2.75 per cent. of alcohol by weight, that is to say, less than 3.4 per cent. by volume. The President under said act of Congress made and promulgated certain other proclamations dated respectively September 16, 1918, January 30, 1919, and March 4, 1919, to which reference is hereby prayed for their terms and provisions.

The complainant further alleges that said war beer so produced, manufactured and sold by it for beverage purposes, which contains not to exceed two and three quarters (2.75) per cent. of alcohol by weight, is not intoxicating when used for beverage purposes.

The complainant further alleges that on October 28, 1919, it had and still has on hand a large number of barrels of said war beer, heretofore duly and lawfully produced and manufactured by it in the ordinary course of its business as aforesaid, to be sold for beverage purposes, and of the value of over one million dollars, and which contain not to exceed two and three-quarters per cent. of alcohol by weight, but more than one-half of one per cent. of alcohol by volume.

10 VI. Heretofore and on the 28th day of October, 1919, the act passed by the Congress of the United States (H. R. 6810) entitled "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye and other lawful industries," was passed by the Congress over the disapproval and veto of the President. The short title of said act as therein provided is the "National Prohibition Act." A copy of the portions of said act of Congress dealing with the subject of war prohibition and so far as material to the present cause of action, is hereunto attached, marked Exhibit I, and reference thereto is prayed as fully as if here set forth at length.

The complainant is advised and therefore avers that it was the intent and purpose of the term "War Prohibition Act" used in title I of said act of Congress of October 28, 1919, to refer to the provisions of that part of the act of Congress approved by the President November 21, 1918, entitled "An Act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled 'An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' and for other purposes," which are hereunto

11 attached, marked Exhibit II, being subdivision "Fourth" of section 1 of said act of Congress, to which reference is prayed as fully as if here set forth at length.

The complainant is advised and therefore avers that the defendants above named are by law expressly charged with the duty of enforcing the terms and provisions of the portions of said acts of Congress hereto annexed as Exhibits I and II, within that portion of the city

and state of New York wherein the complainant has its principal place of business and does and carries on its said business.

VII. The complainant is advised and therefore avers that by the terms of said portions of said acts of Congress, Exhibits I and II hereto, expressly purporting to provide for the enforcement of so-called war prohibition, the defendant United States Attorney is vested with the power and charged with the duty of prosecuting criminally for the crimes denounced and defined therein, any person who uses grains, cereals, fruit, or any other food product in the manufacture or production of beer, wine, or other malt or vinous liquor containing one-half of one per cent. or more of alcohol by volume, for beverage purposes, or who sells any of said beverages; and is further vested with the power and charged with the duty of prosecuting criminally, as a maintainer of a public and common nuisance or an abettor thereof, any person who maintains or assists in maintaining any room, house, building, boat, vehicle, structure, or place of any kind where any of said liquors is sold, manufactured, kept
12 for sale, or bartered; and is further vested with the power and charged with the duty of having such place and all such liquor and all property kept and used in maintaining such place declared a public and common nuisance and abated as such in a suit to be brought by him in equity, and the persons concerned in conducting the same enjoined and restrained from conducting or permitting the continuance of said alleged nuisance, and enjoined and restrained from manufacturing, selling bartering, or storing any of said liquors in such place for a period of one year or during the war and the period of demobilization; and is further vested with the power and charged with the duty of subjecting to a lien the property of any person which is used or occupied to the knowledge of the latter in violation of the provisions of said portions of said acts of Congress in the amount of all fines and costs assessed against the occupant thereof for all such violations, and to cause such property to be sold therefor; and is further vested with the power and charged with the duty of prosecuting any person who manufactures any fermented liquor containing one-half of one per cent. or more of alcohol by volume for the misdemeanors, penalties and forfeitures denounced and defined in section 3340 of the Revised Statutes of the United States, and of causing seizures to be made of the property of such person at the commencement of said suits for said forfeitures.

The complainant is further advised and therefore avers that by the terms and provisions of said portions of said acts of Con-
13 gress, Exhibits I and II hereto, the defendant Acting Collector of Internal Revenue is vested with the power and charged with the duty of reporting to the defendant United States Attorney all violations of said portions of said acts of Congress and of causing the latter to prosecute or take proceedings in accordance therewith; and is further vested with the power and charged with the duty of swearing out warrants for the apprehension of such offenders and of conducting the prosecution at the committing trial for the purpose of having said offenders held for the action of a grand jury;

and is further vested with the power and charged with the duty of suing the surety upon the bond of any brewer who violates the provisions of said portions of said acts of Congress for breach of the conditions of the bond heretofore given by said brewer as required by law, as well as of enforcing and suing for the penalties and forfeitures denounced and defined in section 3340 of the Revised Statutes of the United States, and thus bringing about seizures of the property to be forfeited under said section.

The complainant is further advised and therefore avers that by the terms and provisions of said portions of said acts of Congress, Exhibits I and II hereto, both defendants are, in addition to the aforesaid powers, granted all the powers for the enforcement of said portions of said acts or any provision thereof, which are conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the laws of the United States.

14 The complainant alleges that about three thousand of its customers conduct their business of selling its aforesaid war beer upon leased premises, and that under the provisions of said portion of said National Prohibition Act, title I, Exhibit I hereto, a violation thereof by a lessee or occupant of leased premises permits the lessor to forfeit the lease.

VIII. The complainant is advised and therefore alleges as matter of fact that on October 28, 1919, and for more than six months prior thereto no war emergency or necessity whatever existed or has since existed to warrant or render necessary and proper the prohibition by Congress of the manufacture and sale of non-intoxicating malt liquors; and that there was then and for more than six months prior thereto there had been and ever since there has been an abundant supply of all food products used in the production or manufacture of said beer or malt liquor; that no war emergency whatever then or for more than six months prior thereto existed or has since existed for the conservation of such food products; that there was not then contemplated and there has not been at any time since then any emergency or necessity whatever, whether military or otherwise, calling for or justifying any of the prohibitions against non-intoxicating beverages contained in said portions of said acts of Congress, Exhibits I and II, and that no part or provision of said war prohibition was necessary or proper within the intent and meaning of the Constitution of the United States for carrying into execution any powers vested by the Constitution in the Government of the

15 United States or in any department or officer thereof, and particularly that such prohibition was not necessary or proper for actually prosecuting or carrying on war or for raising or supporting armies, or for providing or maintaining a navy, or for conserving the man power of the Nation, or for increasing efficiency in the production of arms, munitions, ships, food and clothing for the army and navy of the United States; but, on the contrary thereof, said prohibition was not necessary or proper and was and is arbitrary, and was not enacted in contemplation and in pursuance of any exist-

ing war emergency or necessity, or of any purpose to carry on the war, or to raise or support armies, or to provide or maintain a navy, in any manner whatsoever, and that on October 28, 1919, and ever since the national security and defense were and have been in no danger by reason of actual war or otherwise.

IX. The complainant is further advised and therefore alleges as matter of fact that prior to October 28, 1919, the Armistice of November 11, 1918, to which reference is prayed, had been signed on behalf of the United States and Germany and was immediately thereafter accepted and acted upon both by Germany and Austria; that thereupon the President of the United States proclaimed and declared to the Congress that the object of the war had been attained, that having accepted the terms of said Armistice it would be thereafter impossible for Germany to renew hostilities, and that the war
16 had thus come to an end; that on January 30, 1919, the President in and by his proclamation of said date, a copy of which is hereto annexed as Exhibit III, proclaimed that he had found that the prohibition of the use of grain in the manufacture of beverages which are not intoxicating was no longer essential in order to assure an adequate and continuous supply of food; that on March 4, 1919, the President in and by his proclamation of said date, a copy of which is hereto annexed as Exhibit IV, proclaimed that there was then an abundant supply of food products other than grain, and permitted the use thereof in the manufacture of non-intoxicating beverages, including non-intoxicating beer; that on May 20, 1919, in a Message to the Congress, the President proclaimed that the demobilization of the military forces of the country had progressed to such a point that it seemed to him entirely safe then to remove the ban upon the manufacture and sale of wines and beers, and that thereafter and on October 27, 1919, in a Message to the Congress of which a copy is hereto annexed as Exhibit V, the President proclaimed that the army and navy had been demobilized and that the objects of the prohibition embodied in said act of Congress of November 21, 1918, arising out of the emergency of the war had been satisfied in such demobilization. The complainant further alleges that since November 11, 1918, hostilities between the United States and the enemy have in fact ceased, and the enemy by virtue of its compliance with the terms and conditions of said Armistice and the pending Treaty of Peace, has been shorn of substantially all
17 its military power and physically and materially incapaciated from renewing hostilities; that both Germany and Austria have been practically disarmed; that the greater part of the German navy has been surrendered and sunk; that more than three months prior to October 28, 1919, commercial relations had been authorized and resumed between the people of the United States and the peoples of Germany and Austria and now continue; that prior to said date the demobilization of the army and navy of the United States had been completed and such forces reduced to the peacetime establishment; that prior to said date all the war activities of the United States had ceased, and most of the boards, bodies and other govern-

mental instrumentalities appointed or created to carry on such war activities and to meet the emergencies of war had been disbanded or discharged or had ceased to function; and that prior to said date most of the executive and administrative regulations and restrictions imposed upon the people of the United States growing out of the war had been cancelled or removed and substantially all of the excess or surplus war materials and food supplies had been disposed of and substantially all of its excess or surplus war servants, both civil and military, had been discharged.

X. The complainant further alleges that if it should hereafter comply with the terms and provisions of the portions of said acts of Congress, Exhibits I and II, by discontinuing the manufac-
18 ture and sale of non-intoxicating beer as aforesaid, containing not to exceed 2.75 per cent. of alcohol by weight, or if the terms and provisions thereof should be enforced against it so as to prevent such manufacture and sale, its valuable business and goodwill would be destroyed, all profit therefrom would be rendered impossible, the value of its property as a going concern would be destroyed and dissipated, its staff of skilled employees would be disorganized, and the value of its intricate and costly plant and physical assets would be at once depreciated to its junk or salvage value only, and that the great and irreparable injury and damage to the complainant and its stockholders caused thereby would be incapable of being admeasured and adjudicated in an action at law, and it further alleges that if its property used in connection with its business is seized or interfered with, or if its officers, employees, or customers are arrested or prosecuted, or otherwise harassed by legal proceedings, for alleged violations of said portions of said acts of Congress, Exhibits I and II, such seizures, interferences, arrests, prosecutions, or other proceedings would immediately involve it in a multiplicity of suits and legal proceedings and would long before any judgment or decision could be had in such suits and proceedings compel it to cease the conduct of its business, to its great damage and irreparable injury.

The complainant further alleges that beer containing less than one-half of one per cent. of alcohol by volume cannot be
19 successfuly or profitably substituted by it in its business for the war beer it is now manufacturing and selling; that the great majority of its customers would not purchase such beer at all, and that the others would purchase it only in quantities much smaller than their present and ordinary purchases of said war beer; that the market for beer with an alcoholic content of less than one-half of one per cent. by volume is and will be much smaller than the present market for said war beer; and that the complainant cannot convert its present stock of said war beer into beer containing less than one-half of one per cent. of alcohol by volume without being compelled to lose the largest part of the profit which the sale thereof as war beer would earn for the complainant.

XI. The complainant alleges that beer or malt liquor containing only one-half of one per cent. of alcohol by volume is not and cannot

under any conditions produce intoxication, and that a determination to the contrary by the Congress or any other officer or official body of the Government of the United States is and will be without any basis in fact and unreasonable and arbitrary.

The complainant further alleges that the same amount and kind of materials are used and required to produce and manufacture beer or other malt liquor containing but one-half of one per cent. of alcohol by volume, as are used and required to produce and manufacture an equal quantity of beer or other malt liquor containing two and three-quarters per cent. (2.75 p. c.) of alcohol by weight.

XII. The complainant is informed and believes and therefore alleges on information and belief that there are 1250 establishments in the United States brewing malt liquors containing more than one-half of one per cent. of alcohol by volume; that they employ 75,404 persons; that their actual capital investment equals $792,914,000; that their annual pay-rolls total $80,246,000; that the aggregate value of their product is $442,149,000 annually; that on a total barrelage of 50,287,121, they paid to the United States taxes in the year ended June 30, 1918, amounting to $126,285,857, and that it is estimated that at the present rate of $6 per barrel the total amount of their taxes payable to the United States for the year 1919 will be over $301,722,000; that closely related to said business of brewing such malt liquors are industries such as the malt, hop-growing, glass-blowing and cooperage industries, which in large part, if not in whole, are closely related to and largely dependent thereon, and that the total capital invested in said brewing and dependent industries to the extent to which they are dependent thereon, is in excess of one billion dollars.

XIII. The complainant further alleges that, unless restrained by this Honorable Court, the said defendants intend to and will enforce against complainant, its officers, agents, servants, employees and customers, the various pains, penalties, seizures and forfeitures provided for in said act of Congress of November 21, 1918, and said National Prohibition Act and other laws made applicable thereby, and intend to and will commence and prosecute the various prosecutions, proceedings and suits in said acts of Congress purported to be authorized or required; and that such action on the part of the defendants or either of them, will necessarily and inevitably involve the complainant, its officers, agents, servants, employees and customers in a multiplicity of legal proceedings, and involve and threaten it with the arrest and dispersion of its staff of skilled and trained employees or coerce them into quitting its employ in order to avoid prosecution, possible punishment, and other harassment under color of legal proceedings, and threaten and involve the destruction of its business, the seizure of its property, the loss of its customers and the destruction of its good-will and property, all to the irreparable damage of the complainant and its stockholders, and that all and singular the damages resulting from such acts and proceedings would be incapable of admeasurement and adjudication at law.

XIV. The complainant is further informed and verily believes and therefore alleges on information and belief that the defendant's herein are not, either jointly or severally, possessed of sufficient means to satisfy a judgment against them for the large and substantial damages which would accrue to complainant if this Honorable Court does not restrain and enjoin said defendants and each of them, as hereinafter prayed, from interfering with complainant's business and property as aforesaid.

22 Forasmuch, therefore, as your complainant is without remedy in the premises except in a court of equity, and to the end that it may obtain from this Honorable Court the relief to which it is by right and equity entitled, it respectfully prays that the above defendants, and each of them, be directed full, true and perfect answer to make to this bill of complaint, but not under oath, the answer under oath of each of them being hereby expressly waived, and that the said defendants and each of them, their agents, servants, employees and subordinates, and each and every of them, be enjoined and restrained from in any manner enforcing or attempting to enforce or causing to be enforced, against complainant, its officers, agents, servants, employees and customers, or any of them, any of the pains, penalties, seizures and forfeitures provided in and by said portions of said acts of Congress, Exhibits I and II hereto, and other applicable laws, and from arresting or prosecuting, or causing to be arrested or prosecuted, the complainant, its officers, agents, servants, employees and customers, or any of them, for or on account of any alleged violation by them, or any of them, of the terms and provisions of said portions of said acts of Congress, Exhibits I and II, if such violation consist solely of the manufacture or sale of non-intoxicating beer, and from in any manner or to any extent seizing, attempting or causing to be seized, or otherwise interfering with the property, business and affairs of the complainant for or on account of the manufacture or sale of non-intoxicating beer in alleged violation
22¼ of said portions of said acts of Congress; and that the complainant may have such other and further relief as to the Court may seem just and equitable in the premises.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause, whereby the said defendants, their agents, servants, subordinates and employees, and each and every of them, be enjoined and restrained as hereinbefore prayed, and that upon final hearing the said injunction shall be made perpetual.

Wherefore the complainant prays that a writ of subpœna issue herein directed to the above named defendants and each of them, commanding them on a day certain to appear and answer this bill of complaint.

JACOB RUPPERT, A CORPORATION,
By JACOB RUPPERT,
President, Complainant.

ROOT, CLARK, BUCKNER & HOWLAND,
31 *Nassau Street, New York City, and*
FITCH & GRANT,
32 *Nassau Street, New York City,*
Solicitors for Complainant.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
WILLIAM L. MARBURY,
Of Counsel for Complainant.

22½ UNITED STATES OF AMERICA,
State and County of New York:

Jacob Ruppert, being duly sworn, deposes and says:

I am and for over four years last past have been the president of Jacob Ruppert, the complainant corporation above-named. I have read the foregoing bill of complaint and know the contents thereof, and the same is true of my own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

JACOB RUPPERT.

Subscribed and sworn to before me this 29th day of October, 1919.
[NOTARIAL SEAL.] BYRON CLARK, JR,
Notary Public, Kings, County, N. Y.

Certificate filed in New York County.

EXHIBIT I.

Act of Congress of October 28, 1919, entitled:

An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the short title of this Act shall be the "National Prohibition Act."

Title I.

To Provide for the Enforcement of War Prohibition.

The term "War Prohibition Act" used in this Act shall mean the provisions of any Act or Acts prohibiting the sale and manufacture of intoxicating liquors until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States. The words "beer, wine, or other intoxicating malt or vinous liquors" in the War Prohibition Act shall be hereafter construed to mean any such beverages which contain one-half of 1 per centum or more of alcohol by volume: Provided, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of Title II of this act, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe.

Sec. 2. The Commissioner of Internal Revenue, his assistants, agents, and inspectors, shall investigate and report violations of the War Prohibition Act to the United States attorney for the district in which committed, who shall be charged with the duty of prosecuting, subject to the direction of the Attorney General, the offenders as in the case of other offenses against laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury.

Sec. 3. Any room, house, building, boat, vehicle, structure, or place of any kind where intoxicating liquor is sold, manufactured, kept for sale, or bartered in violation of the War Prohibition Act, and all intoxicating liquor and all property kept and used in maintaining such a place, is hereby declared to be a public and common nuisance, and any person who maintains or assists in maintaining such public and common nuisance shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $100 nor more than $1,000, or be imprisoned for not less than thirty days or more than one year or both. If a person has knowledge that his property is occupied or used in violation of the provisions of the War Prohibition Act and suffers the same to be so used, such property shall be subject to a lien for and may be sold to pay all fines and costs assessed against the occupant of such building or property for any violation of the War Pro-

hibition Act occurring after the passage thereof, which said lien shall attach from the time of the filing of notice of the commencement of the suit in the office where the records of the transfer of real estate are kept; and any such lien may be established and enforced by legal action instituted for that purpose in any court having jurisdiction. Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease.

Sec. 4. The United States attorney for the district where such nuisance as is defined in this Act exists, or any officer designated by him or the Attorney General of the United States, may prosecute a suit in equity in the name of the United States to abate and enjoin the same. Actions in equity to enjoin and abate such nuisances may be brought in any court having jurisdiction to hear and determine equity causes. The jurisdiction of the courts of the United States under this section shall be concurrent with that of the courts of the several States.

If it be made to appear by affidavit, or other evidence under oath, to the satisfaction of the court, or judge in vacation, that the nuisance complained of exists, a temporary writ of injunction shall forthwith issue restraining the defendant or defendants from conducting or permitting the continuance of such nuisance until the conclusion of the trial. Where a temporary injunction is prayed for, the court may issue an order restraining the defendants and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation constituting the nuisance. No bond shall be required as a con-
26 dition for making any order or issuing any writ of injunction under this Act. If the court shall find the property involved was being unlawfully used as aforesaid at or about the time alleged in the petition, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or places of any kind, for a period of not exceeding one year or during the war and the period of demobilization. Whenever an action to enjoin a nuisance shall have been brought pursuant to the provisions of this Act, if the owner, lessee, tenant, or occupant appears and pays all costs of the proceedings and files a bond, with sureties to be approved by the clerk of the court in which the action is brought, in the liquidated sum of not less than $500 nor more than $1,000, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein a period of one year thereafter, or during the war and period of demobilization, the court, or in vacation the judge, may, if satisfied of his good faith, direct by appropriate order that the property, if already closed or held under the order of abatement, be delivered to said owner, and said order of abatement canceled, so far as the same may relate to said property; or if said bond be given and costs therein paid before judgment on an order of abatement, the action shall be thereby abated as to said room, house, building, boat, vehicle, structure, or place only. The release of the property

under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law.

In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge, thereof, may summarily try and pun-
27 ish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

Sec. 5. The Commissioner of Internal Revenue, his assistants, agents, and inspectors, and all other officers of the United States whose duty it is to enforce criminal laws, shall have all the power for the enforcement of the War Prohibition Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the laws of the United States.

Sec. 6. If any section or provision of this Act shall be held to be invalid, it is hereby provided that all other provisions of this Act which are not expressly held to be invalid shall continue in full force and effect.

Sec. 7. None of the provisions of this Act shall be construed to repeal any of the provisions of the "War Prohibition Act," or to limit or annul any order or regulation prohibiting the manufacture, sale, or disposition of intoxicating liquors within certain prescribed zones or districts, nor shall the provisions of this Act be construed to prohibit the use of the power of the military or naval au-
28 thorities to enforce the regulations of the President or Secretary of War or Navy issued in pursuance of law, prohibiting the manufacture, use, possession, sale, or other disposition of intoxicating liquors during the period of the war and demobilization thereafter.

EXHIBIT II.

Act of Congress approved November 21, 1918, entitled—

An Act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled * * *

Fourth. * * *. That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used
29 in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June thirtieth, nineteen hundred and nineteen, until this Act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale, and distribution of wine for sacramental, medicinal, or other than beverage uses. After the approval of this Act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization: Provided, That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this Act.

Any person who violates any of the foregoing provisions shall be punished by imprisonment not exceeding one year, or by fine not exceeding $1,000, or by both such imprisonment and fine: Provided, That the President of the United States be, and hereby is authorized and empowered, at any time after the passage of this Act, to establish zones of such a size as he may deem advisable about coal mines, munition factories, shipbuilding plants, and such other plants
30 for war material as may seem to him to require such action whenever in his opinion the creation of such zones is necessary to, or advisable in, the proper prosecution of the war, and that he is hereby authorized and empowered to prohibit the sale, manufacture, or distribution of intoxicating liquors in such zones, and that any violation of the President's regulations in this regard shall be punished by imprisonment for not more than one year, or by

fine of not more than $1,000, or by both such fine and imprisonment: Provided further, That nothing in this Act shall be construed to interfere with the power conferred upon the President by section fifteen of the food-control Act, approved August tenth nineteen hundred and seventeen' (Public Numbered Forty, Sixty-fifth Congress).

Exhibit III.

By the President of the United States.

A Proclamation.

Whereas, under and by virtue of an act of Congress entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, the President, on the 16th day of September, 1918, made the following proclamation:

"Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers conferred on me by said act of Congress, do hereby find and determine that it is essential in order to assure an adequate and continuous supply of
31 food, in order to subserve the national security and defense and because of the increasing requirements of war industries for the fuel productive capacity of the country, the strain upon transportation to serve such industries, and the shortage of labor caused by the necessity of increasing the armed forces of the United States, that the use of, glucose, corn, rice, or any other foods, fruits, food materials and feeds in the production of malt liquors including near beer, for beverage purposes be prohibited. And by this proclamation I prescribe and give public notice that on and after October 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except malt now already made, and hops, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol."

And whereas the prohibition of the use of grain in the manufacture of beverages which are not intoxicating has been found by the President to be no longer essential in order to assure an adequate and continuous supply of food:

Now, therefore, I do hereby modify the aforesaid proclamation made on the 16th day of September, 1918, to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done this thirtieth day of January in the year of our
32 Lord one thousand nine hundred and nineteen, and of the independence of the United States of America the one hundred and forty-third.

WOODROW WILSON.

By the President.
ROBERT LANSING,
Secretary of State.

EXHIBIT IV.

By the President of the United States.

A Proclamation.

Whereas, under and by virtue of an act of Congress entitled "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, the President on the 16th day of September, 1918, made a proclama- containing the following prohibition:

"I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except hops and malt now already made, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol."

And whereas, the President under authority of the said act of August 10, 1917, by further proclamation dated January 30, 1919, modified the said proclamation of September 16, 1918, so as
33 to permit the use of grain in the manufacture of beverages which are not intoxicating, such proclamation providing as follows:

"Whereas the prohibition of the use of grain in the manufacture of beverages which are not intoxicating has been found by the President to be no longer essential in order to assure an adequate and continuous supply of food:

"Now, therefore, I do hereby modify the aforesaid proclamation made on the 16th day of September, 1918, to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating."

And whereas, for the production from a cereal base, of a non-intoxicating beverage, which shall be nutritious and palatable, food products other than grains, of which there is now an abundant supply, but of which the use for such purposes is prohibited by the aforesaid proclamation of September 16, 1918, are required:

Now, therefore, I, Woodrow Wilson, President of the United States, do hereby amend the aforesaid proclamation of September 16, 1918, by inserting in the first sentence of the prohibiting paragraph, after the words "production of" the word "intoxicating," and by striking out of the same sentence the words "including near beer"; and by inserting in the succeeding sentence in both places where the phrase "production of malt liquors" occurs, after the words "production of" the word "intoxicating," and striking out the phrases "including near beer" and "whether or not such malt liquors contain alcohol" in both places in that sentence where these phrases occur, so that as amended the prohibitory provisions of said proclamation shall read as follows:

"That the use of sugar, glucose, corn, rice or any other foods, fruits, food materials and feeds in the production of intoxi-
34 cating malt liquors for beverage purposes be prohibited.

And by this Proclamation I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice, or any other foods, fruits, food materials or feeds, except hops and malt now already made in the production of intoxicating malt liquors for beverage purposes, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of intoxicating malt liquors for beverage purposes, whether or not such malt liquors contain alcohol."

and the aforesaid Proclamation of September 16, 1918, as thus amended, shall remain in full force and effect.

In witness whereof I have hereunto signed my hand and caused the seal of the United States to be affixed.

Done this 4th day of March in the year of our Lord one thousand nine hundred and nineteen and of the independence of the United States of America the one hundred and forty-third.

(Signed) WOODROW WILSON.

FRANK L. POLK,
Acting Secretary of State.

EXHIBIT V.

Veto Message by the President of the United States.

To the House of Representatives:

I am returning, without my signature, H. R. 6810, "an act to prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high proof spirits for other than beverage

purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye,
35 and other lawful industries."

The subject matter treated in this measure deals with two distinct phases of the prohibition legislation. One part of the act under consideration seeks to enforce wartime prohibition. The other provides for the enforcement which was made necessary by the adoption of the constitutional amendment. I object to and cannot approve that part of this legislation with reference to wartime prohibition.

It has to do with the enforcement of an act which was passed by reason of the emergencies of the war and whose objects have been satisfied in the demobilization of the army and navy and whose repeal I have already sought at the hands of Congress. Where the purposes of particular legislation arising out of war emergency have been satisfied, sound public policy makes clear the reason and necessity for repeal.

It will not be difficult for Congress, in considering this important matter, to separate these two questions and effectively to legislate regarding them; making the proper distinction between temporary causes which arose out of wartime emergencies and those like the constitutional amendment of prohibition which is now part of the fundamental law of the country.

In all matters having to do with the personal habits and customs of large numbers of our people we must be certain that the established processes of legal change are followed. In no other way can the salutary object sought or accomplished by great reforms of this character be made satisfactory and permanent.

WOODROW WILSON.

The White House, 27 October, 1919.

U. S. District Court S. D. of N. Y. Filed Oct. 30, 1919.

36 United States District Court, Southern District of New York.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

Affidavits and Order to Show Cause.

Root, Clark, Buckner & Howland, 31 Nassau Street, New York City, and

Fitch & Grant, 32 Nassau Street, New York City, solicitors for complainant.

Elihu Root, William D. Guthrie, William L. Marbury, of counsel for complainant.

37 *Order to Show Cause.*

United States District Court, Southern District of New York.

In Equity. E. 16—251.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

Order to Show Cause.

Upon the annexed affidavits and bill of complaint herein, it is

Ordered that the defendants show cause at a stated term of this court for the hearing of motions, to be held by the Hon. Learned Hand, District Judge, at the United States Courts and Post Office Building, in the Borough of Manhattan, City of New York, on the 5th day of November, 1919, at 2 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue herein restraining and enjoining the defendants as prayed for in said bill of complaint, and why the complainant should not have such other and further relief as to the court may seem just and proper; and it is

Further ordered that service of a copy of this order upon each of said defendants before 12 o'clock noon of the first day of November, 1919, shall be deemed sufficient.

Dated, October 31st, 1919.

AUGUST N. HAND,
U. S. D. J.

38 *Affidavit of E. R. Buckner.*

United States District Court, Southern District of New York.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Emory R. Buckner, being duly sworn, deposes and says:

I am one of the solicitors for the complainant and familiar with the bill of complaint herein. As appears therefrom and from the

annexed affidavits, the enforcement of the portions of the acts of Congress therein referred to against the complainant would at once cause it irreparable damage. The next regular motion day at which the court can hear an application for a preliminary injunction is Friday, November 7, 1919. Hence an order to show cause for an earlier date is desired. No other or previous application for the relief herein sought has been made to any court or judge.

EMORY R. BUCKNER.

Subscribed and sworn to before me this 31st day of October, 1919.
[NOTARIAL SEAL.] BERNARD HERSHKOPF,
Notary Public, New York County, N. Y.

39 *Affidavit of Hugh F. Fox.*

District Court of the United States, Southern District of New York.

In Equity.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Hugh F. Fox, being duly sworn, deposes and says as follows:

I. I am 56 years of age and reside at Riverside, Connecticut. I am now, and have been for eleven years, secretary of the United States Brewers' Association, an organization comprising in its membership sixty per cent. of the brewing corporations and concerns of the United States as measured by numbers, and considerably more than sixty per cent. of the brewing industry of the United States, when calculated on the basis of barrelage or output. I am also vice-president of the New York and Pacific Hop Company, of Newark, New Jersey, and for twenty-six years prior to my secretaryship with the United States Brewers' Association, I was engaged in the
40 hop business. For twenty years I bought and sold hops and visited the principal brewers at their plants at frequent intervals.

II. As secretary of the United States Brewers' Association, I am in constant communication with the brewers, visiting brewing plants and the principal brewing centers, and serve as secretary of the various standing committees of the same Association which procure statistics as to the materials used in brewing, promote the development of the crops of raw materials which enter into the process of brewing, and procure and keep records of all labor contracts entered into by brewers. The United States Brewers' Association acts as a

bureau of information upon all matters pertaining to the brewing industry, and I am conversant with the manufacturing, commercial and financial aspects of the brewing business.

III. The latest official figures as to the value of the investment in establishments engaged in the production of malt liquors in the United States, the number of employes engaged in the industry, the salaries and wages paid to such employes, the value of the product of the industry, and the value added to the material by the manufacture, are for the year 1914. Since that time the volume of the business has been reduced, but due to changes in the value of the property and of the product of the business, and in the scale of wages and salaries, the official figures for the year 1914 represent approximately the situation at the present time.

These official figures for 1914 appear in a number of publications issued by the Bureau of Census of the Department of Com-
41 merce of the United States Government, among them being Statistical Abstract of the United States, 1917, fortieth number. This shows that in the year 1914 there were 1,250 establishments engaged in the production of malt liquors in the United States, and that a total of 75,404 persons were engaged in the industry, of whom 62,070 were the average number of wage earners, and 12,823 were salaried employees. The actual capital invested in the industry was $792,914,000.00; the salaries paid amounted to $27,602,000.00; and the wages paid amounted to $53,244,000.00. The value of the product amounted to $442,149,000.00. The value added to the material by manufacture was $312,425,000.00. These statistics are found on page 196 of the aforesaid Statistical Abstract of the United States, 1917.

The report of the Commissioner of Internal Revenue for the fiscal year ended June 30, 1918, shows that the output of breweries aggregated 50,287,121 barrels, a decrease of 10,530,258 barrels from the production of 1917. This decrease was principally due to war restrictions under the orders of the United States Food Administration. The Commissioner reports that the internal revenue receipts from the tax on fermented liquors for the year ended June 30, 1918, amounted to $126,285,857.65. The tax now in effect of $6.00 per barrel would yield an annual revenue on the same barrelage of $301,722,726.00.

IV. The malt industry throughout the United States is dependent almost entirely upon the continuance of brewing, as the brewing industry absorbs or purchases almost all of the malt which is produced, and as there is very little demand for malt for any other purpose.

42 V. The growing of hops in the United States is very largely dependent upon the continuance of brewing, as the brewers of the United States have consumed a very large proportion of the hops grown in this country, and as there is very little demand for hops for any other purpose except for use in brewing. The 13th Census of the United States, 1910, Volume 5, shows that in the year 1909,

44,693 acres were devoted to the growth of hops in the United States, and that the producion was 40,719,000 pounds, valued at $7,845,000.00. While the production of hops has decreased since the year 1909, the market value has very considerably increased. The hop crop fluctuates considerably from year to year, according to the weather conditions during the growing season, but under favorable conditions it is expected that the yield in 1919 will amount to over 25,000,000 pounds, which at present prices will have a value of $10,000,000.00.

The value of land used for hop growing runs from two hundred to five hundred dollars per acre, and the investment in kilns, trellis and machinery and equipment used in this business varies from two hundred to five hundred dollars per acre of land devoted to the growing of hops. At a more conservative estimate the value of the investment in the hop business is at the present time more than $10,000,000.00.

VI. In addition to the foregoing industries which are entirely or almost entirely dependent upon the brewing industry, there are a number of others which are in considerable part dependent upon the brewing industry. Examples of such industries are glass blowing, cooperage, and the manufacture of special machinery used in the brewing and allied lines. From my knowledge of the invest-
43 ment in the brewing and malt and hop industries, and of the extent to which other industries are dependent upon the brewing business, I conservatively estimate that the total capital invested in the brewing business and in dependent industries to the extent to which they are dependent upon the brewing business is over one billion dollars ($1,000,000,000.00).

VII. The success of a brewing establishment depends upon its continuous operation and the keeping together of a staff of skilled technical men, trained wage-earners, canvassers, salesmen and office employees. The stoppage of the business, for even a short period of time, involves heavy losses to the industry for a much longer period than that of the stoppage itself. If the work should be stopped there would be a partial and ultimately a total dispersion of the work, the office and distributing forces of the industry, and even if the interruption should be for even a short period, these forces could not be built up again, either in numbers or in quality, for a long period of time after the plant was ready to resume operations. In most of the breweries it has taken from thirty to fifty years to build up their present forces, and during this time the companies have been enabled to create most highly organized and most highly specialized staffs.

The same difficulty would arise with respect to the brewery plants. The equipment is of a kind which readily falls into disrepair. The prime requisite of the art of brewing consists in the absolute cleanliness of all of the equipment and of the establishment. The machinery must be kept keyed up, the cellars kept cool by refrigera-
44 tion; the copper vessels, the boilers and the furnaces maintained in perfect condition; and the storage vats must be kept

absolutely free from any impurities. The breweries cannot be used for other purposes during either a temporary stoppage or a permanent closing of the business.

The impossibility of conducting any one day's brewing for which the plans and the raw material contract have not been made a long time in advance, is another factor extending the losses beyond the period of a temporary stoppage. The hops which are used in brewing are grown on the Pacific Coast and elsewhere, and must be shipped a long time in advance. The barley which is used for malting is grown in Iowa, Wisconsin, Minnesota, California and other Western States, and must be shipped far in advance. The brewers cannot keep the raw materials on hand merely with a view to the possibility of the resumption of their business because of the inherent risk and because the materials themselves are perishable, would deteriorate and become unusable.

The brewers must, therefore, know that they will manufacture at a definite period before they can make contracts for the raw materials to be used during that period and these contracts must be made a long time in advance. This is necessary not only because of the time required for shipments, but also because the brewers' contracts are made with dealers, as, for example, the maltsters, who themselves must make their contracts with others. The hop growers, for example, are dependent upon the hop merchants to finance the expense of growing, cultivating and harvesting their crops, and these contracts in turn are based upon sales made far in advance to brewers.

45 Another example is that of the manufacturers of glass bottles, whose business is largely dependent upon the brewing industry, and whose contracts with the labor unions and with those who furnish them with raw materials are made only upon the knowledge that their product for the period of such contracts will be taken by the brewing interests.

If therefore the breweries of the United States should be compelled to close their doors for any period, the effect would be to disrupt their business and the businesses dependent upon it, to disorganize the personnel of all the establishments involved, to scatter their forces and to destroy a great part of the capital invested in those industries. No one could calculate how large or how much the damage would be.

Aside from the mere temporary stoppage, any interference with the brewing industry would result in irreparable damage to the owners of the properties and to the workers engaged in the business. Seizure of the plants or of their products would halt the business, disperse its force, sacrifice its trade and its good will, and absolutely ruin many of the people engaged in the business. The same would result from the arrests of principals or their agents or employees, or from prosecutions or threats of prosecutions.

The buildings used for brewing have been specially constructed for brewing operations and are not adapted for any other purposes; the costly machinery and apparatus is specially designed for brewing purposes and is practically valueless for anything else; the containers

used for beer, which are very expensive, are not available for
46 other uses, and the whole physical properties of the industry would be reduced to their salvage value as mere junk.

A very large proportion of the wage earners engaged in the brewing industry are persons who have been employed for many years, and have families dependent upon them. While they have been trained in the industry, their experience has been specialized, and it would be exceedingly difficult for them to obtain a livelihood in other industries. They could not, indeed, qualify in any other crafts, and would have to take their chance of employment in the ranks of unorganized, unskilled and seasonal labor.

VIII. The following statements in this affidavit are made on information and belief, based, except where otherwise indicated, upon statements printed in the Official United States Bulletin and in the United States Bulletin. The Official United States Bulletin was published daily under order of the President of the United States by the Committee on Public Information, which was itself created by Executive order of the President. It was succeeded in April, 1919, by the United State Bulletin which continued to publish the official statements issued by the different Departments of the Government. The United States Brewers' Association has been a regular subscriber to each of these publications and received copies of the same and I am familiar with them.

IX. The President of the United States on November 11, 1918, duly informed the Congress that the war had come to an end, and by executive order, duly promulgated and dated December 3, 1918, referred as a matter of fact to the cessation of war activities.

47 X. The cessation of war activities so referred to by the President is further evidenced by the facts that the demobilization of the Army and Navy of the United States, as it was constituted on its war footing, was by direction of the President begun on November 12, 1918, and has since been completed; that the War Department duly stated in June, 1919, that all divisions of the Army of the United States that had been in France were to have returned in that month, except divisions of the Regular Army; that the War Department officially stated on October 27, 1919, that the strength of the army on October 21, 1919, was 274,787 whereas the law permits an average enlisted strength of 325,000 during the year and that from November 11, 1918, to October 23, 1919, a total of 3,411,509 troops had been discharged; that the Navy has been reduced to less than its authorized peace quota and that it now numbers less than 135,000 men; that most of the war camps, cantonments, hospitals, machine shops and other war instrumentalities and necessaries created prior to November 11, 1918, in the prosecution of the war have been wholly closed and discontinued; that the War and Navy Departments have cancelled numerous contracts for war supplies, because such supplies were no longer needed for any war purposes; that the War and Navy Departments have sold to the civilian population of the country large stocks of food supplies which had been accumu-

lated for use in the prosecution of the war, and were no longer required because of the actual cessation of war activities and hostilities; that the War and Navy Departments have disposed of large amounts of war supplies on hand, likewise accumulated for use in the prosecution of the war, but no longer required, amount-
48 ing in the aggregate to many hundreds of million of dollars; that the War Department has sold to the French Government all of the surplus property of the American Expeditionary Force in France and is endeavoring to sell abroad all the surplus railway material in this country heretofore purchased by the War Department, because no longer necessary, in view of the cessation of war activities and hostilities.

XI. The cessation of war activities is further evidenced, as appears in and by said official bulletins, by the fact that they duly proclaim and show that there is no shortage of food supplies for the prosecution of war, but that, to the contrary, on November 14, 1918, the War Industries Board rescinded its war-time order curtailing the production of soft drinks and mineral waters; that on December 5, 1918, the United States Food Administration duly proclaimed that the country had a sufficient supply of a large variety of grains and other foods and food products; that on January 30, 1919, the President duly proclaimed that the prohibition of the use of grain in the manufacture of non-intoxicating beverages was no longer essential in order to secure an adequate and continuous supply of food; that on March 4, 1919, he duly proclaimed that there was then an abundant supply of food products; that on May 20, 1919, in a message to the Congress, he declared that demobilization of the military forces had progressed to such a point that it seemed to him entirely safe then to remove the ban upon the manufacture and sale of wines and beers; and that on August 8, 1919, in an address to the Congress the President proclaimed that there was no shortage of food supplies in this country. The demobilization of the French Army, as it ap-
49 pears from announcements in the public press, is virtually completed, 4,322,000 men and 101,609 officers having been mustered out of the military service.

XII. The cessation of war activities is further evidenced, as appears in and by said official bulletins, in the fact that they proclaim and show the discontinuance and disbandment of most of the war agencies created during the pendency of the war and actual hostilities, such, for example, as——

(1) The termination of the cable censorship, as of July 23, 1919.

(2) The termination and relinquishment of the control of the wire systems of the country, as of and after July 30, 1919.

(3) The disbandment of the War Industries Board, the United States Food Administration, the United States Fuel Administration, the Central Bureau of Planning and Statistics, the War Labor Policies Board, the Conference of National Labor Adjustment Board, the War Labor Board, the United States Employment Service, the Investiga-

tion and Inspection Service of the Department of Labor, the National Harness and Saddlery Adjustment Commission, the Cantonment Adjustment Commission, the Administration of Labor Standards in Army Clothing, all war commissions and war agencies connected with the War Department, except those required for the winding up of business, which are themselves now being rapidly disbanded, the Priorities Boards, and a large number of other agencies created to assist in the prosecution of the war.

XIII. The cessation of war activities is further evidenced, as appears in and by said official bulletins, in the fact that from and after July 14, 1919, trade relations and communications with the people of Germany have been duly authorized by the President, and have since that date been resumed and are now being carried on.

XIV. Said official bulletins further show that the President of the United States on July 10, 1919, submitted to the Senate of the United States the proposed Treaty of Peace with Germany, proposed by the Allied and Associated Powers including the United States. Article 440 of this Treaty provides, among other things, as follows:

"A first proces-verbal of the deposit of ratification will be drawn up as soon as the Treaty has been ratified by Germany on the one hand, and by three of the Principal Allied and Associated Powers on the other hand.

"From the date of this first proces-verbal the Treaty will come into force between the High Contracting Parties who have ratified it. For the determination of all periods of time provided for in the present Treaty this date will be the date of the coming into force of the Treaty.

"In all other respects the Treaty will enter into force for each Power at the date of the deposit of its ratification."

The said Treaty of Peace has been ratified by Germany, and by Great Britain, France, Italy and Japan, four of the principal Allied and Associated Powers, and by others of the signatories of the Treaty, including Belgium, the Dominion of Canada and the Union of South Africa.

HUGH F. FOX.

Sworn to before me this 29th day of October, 1919.

[NOTARIAL SEAL.] CHAS. KRUSE,
Notary Public, Kings County, No. 47,
Reg. No. 142.

Certificate filed in N. Y. County, No. 134, Reg. No. 10117.
Term expires March 30, 1920.

51 *Supplemental Affidavit of Hugh F. Fox.*

District Court of the United States, Southern District of New York.

In Equity.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Hugh F. Fox, being duly sworn, deposes and says as follows:

I. This affidavit is supplemental to an affidavit made by me in the above entitled action on October 29, 1919, and is made on information and belief based upon the same general sources mentioned in my affidavit of October 29, 1919.

II. The President of the United States has, on a number of occasions officially recognized both that the war necessity has passed and that the war is at an end.

In his address to Congress on November 11, 1918, he read the terms of the armistice which, he stated, had just been signed, and immediately thereafter he said:

"The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it."

52 In the course of his Thanksgiving Proclamation issued on November 18, 1918, the President stated:

"God has in His good pleasure given us peace. It has not come as a mere cessation of arms, a mere relief from the strain and tragedy of war. It has come as a great triumph of right. Complete victory has brought us, not peace alone, but the confident promise of a new day as well, in which justice shall replace force and jealous intrigue among the nations."

The President on December 2, 1918, addressed the new Congress, saying in part as follows:

"What we all thank God for with deepest gratitude is that our men went in force into the line of battle just at the critical moment when the whole fate of the world seemed to hang in the balance and threw their fresh strength into the ranks of freedom in time to turn the whole tide and sweep of the fateful struggle,—turn it once for all, so that thenceforth it was back, back, back for their enemies,

always back, never again forward! After that it was only a scant four months before the commanders of the Central Empires knew themselves beaten; and now their very empires are in liquidation."

* * * * * * *

"And now we are sure of the great triumph for which every sacrifice was made. It has come, come in its completeness, and with the pride and inspiration of these days of achievement quick within us we turn to the tasks of peace again,—a peace secure against the violence of irresponsible monarchs and ambitious military coteries and make ready for a new order, for new foundations by justice and fair dealing."

* * * * * * *

"While the war lasted we set up many agencies by which
53 to direct the industries of the country in the services it was necessary for them to render, by which to make sure of an abundant supply of the materials needed, by which to check undertakings that could for the time be dispensed with and stimulate those that were most serviceable in war, by which to gain for the purchasing departments of the Government a certain control over the prices of essential articles and materials, by which to restrain trade with alien enemies, make the most of the available shipping, and systematize financial transactions, both public and private, so that there would be no unnecessary conflict or confusion, by which, in short, to put every material energy of the country in harness to draw the common load and make of us one team in the accomplishment of a great task. But the moment we knew the armistice to have been signed we took the harness off. Raw materials upon which the Government had kept its hand for fear there should not be enough for the industries that supplied the armies have been released and put into the general market again. Great industrial plants whose whole output and machinery had been taken over for the uses of the Government have been set free to return to the uses to which they were put before the war."

* * * * * * *

"It has been the policy of the Executive, therefore, since the armistice was assured (which is in effect a complete submission of the enemy) to put the knowledge of these bodies at the disposal of the business men of the country and to offer their intelligent mediation at every point and in every matter where it was desired. It is surprising how fast the process of return to a peace footing has moved in the three weeks since the fighting stopped. It
54 promises to outrun any inquiry that may be instituted and any aid that may be offered."

* * * * * * *

"It was necessary that the administration of the railways should be taken over by the Government so long as the war lasted * * * But all these necessities have now been served, and the question is what is best for the railroads and for the public in the future."

The President on November 30, 1918, addressed the Hon. Bernard M. Baruch, Chairman of the War Industries Board, approving his recommendation that the activities of the Board should cease on January 1, 1919. This letter was in reply to a letter written by the Chairman of the War Industries Board to the President under date of November 29, 1918, which was in part as follows:

"With the signing of the armistice and the consequent cancellation of contracts, there was no longer a shortage of materials, and the War Industries Board immediately removed its curtailments * * *

"There being no longer a necessity for the continuance of the War Industries Board, which was only a war-making body, and it being your desire to avoid the incurring of expense for a moment longer than necessary, I am writing to suggest that the United States War Industries Board be discontinued as of January 1, 1919, and I am now placing my resignation as chairman in your hands for whatever action you may desire."

The President, in the course of his address to the American Army in France on December 25, 1918, said:

"* * * The quiet of peace and tranquility of settled hopes has descended upon us * * *"

55 The President's statement of April 23, 1919, on the Adriatic question, included the following passage:

"The Austro-Hungarian empire, then the enemy of Europe, and at whose expense the pact of London was to be kept in the event of victory, has gone to pieces and no longer exists."

The President recommended to Congress on May 20, 1919, certain legislation. His message was in part as follows:

"Many of the minor taxes provided for in the revenue legislation of 1917 and 1918, though no doubt made necessary by the pressing necessities of the war time, can hardly find sufficient justification under the easier circumstances of peace, and can now happily be got rid of.

* * * * * * *

"The demobilization of the military forces of the country has progressed to such a point that it seems to me entirely safe now to remove the ban upon the manufacture and sale of wines and beers, but I am advised that without further legislation I have not the legal authority to remove the present restrictions. I therefore recommend that the Act approved November 21, 1918, entitled 'An Act to enable the Secretary of Agriculture to carry out, during the

fiscal year ending June 30, 1919, the purposes of the Act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," and for other purposes,' be amended or repealed in so far as it applies to wines and beers."

III. The United States Bulletin of July 21, 1919, contained an announcement of the resumption of trade with Germany,
56 which read in part as follows:

"The War Trade Board Section of the Department of State announces (W. T. B. R. 802), that a general enemy trade license has been issued authorizing all persons in the United States, on and after July 14, 1919, to trade and communicate with persons residing in Germany and to trade and communicate with all persons with whom trade and communication is prohibited by the trading with the enemy act; subject, however, to the following specific limitations and exceptions, to-wit:

"The above mentioned general license does not authorize the importation into the United States from Germany or elsewhere of dyes, dyestuffs, potash, drugs or chemicals, which have been produced or manufactured in Germany."

The United States Bulletin for July 28, 1919, contained the following announcement of the removal of restrictions on exports:

"The War Trade Board Section of the Department of State announces (W. T. B. R. 815) that Special Export License RAC-77, granted the Customs Service, effective July 14, 1919, W. T. B. R. 803, has been extended and reissued, effective July 21, 1919. Special Export License RAC-77 as now amended authorizes the exportation by freight or express, without individual licenses, to the countries hereinbelow mentioned, of all commodities whatsoever, except (1) arms, ammunition and explosives consigned to Mexico or China, (2) machinery or materials intended for the manufacture of munitions, and radio or wireless apparatus consigned to Mexico, and (3) wheat and wheat flour, the control over the exportation of which has been vested in the Wheat Director. (See W. T. B. R. 797, issued June 30, 1919.)

57 "A. Any country in the Western Hemisphere.

"B. Any country in Africa.

"C. Any country in Asia or Oceani-a, except Turkey.

"D. The following countries in Europe:

"United Kingdom, France, Italy and that territory included in the line set out in article 3 of the military clause of the armistice protocol of Nov. 3, 1918, Belgium, Greece, Spain, Portugal, or their possessions in Europe; Iceland, Faroe Islands, Serbia, Roumania, Norway, Sweden, Denmark, Holland, Switzerland, Germany (including that territory on the left bank of the Rhine occcupied by

forces of the associated Governments), Jugo-Slavia, Czecho-Slovakia, Finland, Latvia, Lithuania, Esthonia and Poland."

The United States Bulletin for August 25, 1919, contained the following additional announcement:

"The War Trade Board Section of the Department of State announces (W. T. B. R. 826) that paragraph 1 of the limitations upon the General Enemy Trade License announced in W. T. B. R. 802 issued July 14, 1919, has been amended, effective Aug. 15, 1919, so as to delete from said paragraph the general item 'drugs or chemicals,' and to substitute in lieu thereof only the commodities specifically enumerated in paragraph 4 of W. T. B. R. 825, issued Aug. 15, 1919; and, accordingly, said General License as now amended authorizes the importation into the United States of drugs and chemicals produced or manufactured in Germany except those specifically enumerated in said paragraph 4 of W. T. B. R. 825."

The United States Bulletin of September 8, 1919, contained the following statement with respect to import of German dyes:

58 "The War Trade Board is sending out the following letter:

"SIRS:—You are advised that the War Trade Board Section of the Department of State has determined to permit the importation of vat dyes from Germany in quantities sufficient to supply the requirements of the consumers of the United States for the six months' period, October 1, 1919, to April 1, 1920. Importations of these articles will be governed by rules and regulations which will be announced as soon as the necessary details have been completed. In the meantime, you are requested to file with the War Trade Board Section on or before September 15, 1919, applications and undertakings of the form enclosed herewith, in which will be stated your estimates of the amounts of vat dyes which will be required for consumption in your plant during the above-mentioned six months' period. Upon receipt of your applications, the War Trade Board Section will advise you as to amount of German vat dyes which may be imported for your use during said period.

Very truly yours,

BUREAU OF IMPORTS."

The United States Bulletin of October 6, 1919, contained the following announcement:

"The War Trade Board Section of the Department of State announces (W. T. B. R. 833) that Special Export License RAC-77, W. T. B. R. 831, has been extended and reissued, effective October 1, 1919. Special Export License RAC-77 as amended will authorize the exportation by freight or express, without individual licenses to the countries hereinbelow mentioned, of all commodities whatsoever, except (1) certain commodities as listed below when destined to Hungary, the Republic of Austria, Bulgaria or Turkey, (2) arms,

ammunition, and explosives consigned to China, (3) wheat
59 and wheat flour, the control over the export of which has been vested in the Wheat Director (see W. T. B. R. 707, issued June 30, 1919):

"A. Any country in the Western Hemisphere.

"B. Any country in Africa.

"C. Any country in Asia or Oceanica.

"D. Any country in Europe except Russia * * *"

IV. The general staff of the War Department on September 1, 1919, issued the following announcement:

"Plans have been made for sale to the public of practically the entire amount of surplus subsistence in possession of the army. This includes about 213,000,000 pounds of bacon and canned meats, enough to supply two pounds to each person in the country, and about 135,000,000 pounds of canned vegetables, or 1.25 pounds per person. In addition there are about 200 items, available for the most part in small quantities.

"A few surplus articles have not been made available for general distribution owing to the difficulty of shipment by parcel post. The principal items of this character consist of frozen meats including:

Beef	60,000,000 pounds;
Pork	7,000,000 pounds;
Poultry	3,000,000 pounds;
Mutton	1,000,000 pounds."

A. E. F. Inventory Nearly Completed.

"The inventory of property owned by the A. E. F. in France, most of which has been sold to the French Government, is now completed with the exception of material scheduled for return to this country and a small amount of other property."

V. The United States Shipping Board announced on April 25, 1919, that since the signing of the armistice on November
60 11, 1918, it cancelled contracts for more than 2,000,000 tons of steel ships and then found it necessary to cancel an additional 2,000,000 tons of steel ships, and added: "We should now be building only on peace prices."

The Shipping Board on February 3, 1919, announced that the Dutch ships taken over by the United States were to be immediately and unconditionally returned to Holland. The Shipping Board said:

"This action is to be carried out because the war emergency and necessity under which the ships were taken over has passed."

The United States Railroad Administration proclaimed on February 27, 1919, the return to their owners of the coastwise steamships which were taken over by the Government. The Administration statement said in part:

"Following the signing of the armistice and the passing of the emergency war necessity it was decided that the maintenance of these lines under Federal control was no longer necessary * * *"

* * * * * * *

"Because of the return to peace conditions, differential rates via rail and water between New England and Central Freight Association territory, Southeastern Mississippi Valley territory, the West and Southwest are now being considered and some change in this situation should become effective during the month of March."

A statement addressed to the American people was issued by the Director General of Railroads as early as December 11, 1918, as follows:

"This emergency has now passed. The war has been won.

* * * * * * *

61 "The war now being practically over, it will be the policy of the Railroad Administration during the remaining period of Federal control, to give to the public the best service of which the railroads are capable."

On December 11, 1918, the Director General of Railroads wrote to the Chairman of the Interstate and Foreign Commerce Committee of the House of Representatives, saying:

"The war is ended and we are now confronted with the necessity either of legislating intelligently about the railroad problem at this session of the Congress or of promptly returning the railroads to their owners."

HON. T. W. SIMS,
Chairman, Interstate and Foreign Commerce Committee, House of Representatives.

VI. As reported in despatches from Washington, on October 29, 1919, Herbert Hoover, formerly Food Administrator of the United States, testified before the Sub-committee on Foreign Affairs of the War Department Expenditures Committee of the House of Representatives. Among other things, he stated that upon the completion of the harvests, there would be in this country a surplus of 16,000,000 to 20,000,000 tons of food. He stated that the War-time Prohibition Act was largely responsible for the increase in the consumption of candy and soft drinks in the manufacture of which sugar is used, and was, in consequence, largely responsible for the

threatened sugar shortage in this country. Among other things he said:

"Prohibition by increasing the sale of soft drinks and candies has increased the consumption of sugar in this country 350,000 tons a year. In March it seemed as if supplies would be
62 ample, but wartime prohibition rapidly decreased surpluses. The available supplies for November and December are virtually the largest in history, but the increased demand probably will cause a minor shortage, which might develop into a famine if the consumers are not protected. Several years ago the per capita consumption was seventy-three pounds a year. About a year ago it was eighty-four, but prohibition has sent it up to ninety-three.

"My own view of the situation is that there was over-exportation of food supplies this year. The excess of from 16,000,000 to 20,000,000 tons of food which we will have at the end of the harvests cannot be moved out of the country without the establishment of credit machinery. Europe's low credit should work to the benefit of the people of this country by decreasing exports.

"Large Food Stock Here.

"It is popularly supposed that we over-exported food last year. The facts are that this is not true. The stocks of food in the United States last August were the largest in our history. My belief is that speculation rather than any fundamental reason has caused high prices.

"There have been two forms of speculation. One is the relatively small amount of purely vicious speculation in food supplies in which men purchased food and held it for higher prices. The other is the larger condition I have referred to in which exporters of food bought up week after week supplies of all kinds in anticipation that after the armistice was signed Germany and other countries would buy it.

"The purchasers did not materialize. When exports did not move, prices began to drop in the wholesale market, though there was little reduction in the retail price. Still the buying
63 by exporters went on, for there was a perfect cloud of reports from Germany that a large food vacuum must be filled. It was this large buying that forced prices up and the failure of the supplies to move caused slight reductions in the wholesale price. This drop will, I believe, continue, and to my mind a heavy fall in price of staples is due.

"Another reason for higher prices is the habit the American people have acquired of buying expensive things. It is a feature of the appalling psychology of the situation."

HUGH F. FOX.

Sworn to before me this 31st day of October, 1919.

[NOTORIAL SEAL.] CHAS. KRUSE,
Notary Public, Kings County,
No. 47, Reg. No. 142.

Certificate filed in N. Y. County, No. 134, Reg. No. 10117.
Term expires March 30, 1920.

64 *Affidavit of Jacob Ruppert.*

United States District Court, Southern District of New York.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney, etc., and RICHARD J. MCELLIGOTT, Acting and Deputy Collector of Internal Revenue, etc., Defendants.

STATE OF NEW YORK,
County of New York, ss:

JACOB RUPPERT, being duly sworn, deposes and says:

1. I am the president of Jacob Ruppert, a corporation duly organized and existing under the laws of the State of New York, and having its principal place of business in the City, County and State of New York. All the officers, directors and stockholders of the said corporation are citizens of the United States by birth.

2. The said corporation was incorporated in 1910, as a manufacturing corporation for the purpose of carrying on and conducting the manufacture and brewing of lager beer and other malt liquors and of doing such other business as might be necessary, incidental or convenient for the operation of the business of such manufacture and the sale of its products. It succeeded to the valuable and extensive business of and the property theretofore used herein
65 by one Jacob Ruppert, and the good-will established therein by him from about the year 1857, at which time he entered upon said business of brewing, manufacturing, producing and selling malt liquors, until about 1910, when he transferred the said business and property to said corporation, which has ever since owned, managed, carried on and conducted said business. The said corporation has a capital stock of the par value of one hundred thousand dollars ($100,000), divided into one thousand (1,000) shares of the par value of one hundred dollars ($100) each, all of which stock has been duly issued for value and is now outstanding.

Until the times hereinafter mentioned the said corporation engaged in manufacturing and selling large quantities of malt liquors. The business thus conducted by complainant amounted in 1916, 1917 and 1918 to over six million dollars ($6,000,000), eight million

dollars ($8,000,000), and ten million dollars ($10,000,000) respectively, and its good-will was then of large and growing value. Since January 1, 1918, the said corporation has engaged in the manufacture and sale of "war beer," i. e., beer containing less than 2.75 per cent. of alcohol by weight, and all such beer has been and is non-intoxicating.

3. The said corporation, in addition to other valuable real estate, owns three plots of real estate, comprising sixty-five lots in the City of New York, which are used by it for the purpose of its aforesaid brewing business, and these plots of real estate have a gross assessed valuation of over one million, eight hundred and forty thousand dollars ($1,840,000).

66 The present book value, after allowing for depreciation and exclusive of buildings, of its fixtures, plant and other personal property, is in excess of ten million, seven hundred thousand dollars ($10,700,000), and such personal property comprises, among other things, machinery, wagons, trucks, leases, chattel mortgages real estate mortgages, horses, office furniture, fixtures, stock and supplies on hand and accounts receivable, the latter aggregating hundreds of thousand of dollars in value.

It has during the last three years sold its wares to about four thousand (4,000) customers each year, and during said period its yearly sales of beer manufactured by it were approximately as follows:

Year	Barrels
1916	1,105,000
1917	1,206,000
1918	904,000

4. The average weekly business for the four weeks of the month of September last past amounted to approximately more than three hundred thousand dollars ($300,000), and the sales of beer, containing not to exceed two and three-quarters per cent. of alcohol by volume, for the month of September, 1919, amounted to seventy-one thousand, five hundred and fifteen (71,515) barrels.

It employs in its business over seven hundred (700) men with a total monthly payroll of approximately eighty-eight thousand dollars ($88,000).

5. On the 28th day of October, 1919, the said corporation had brewed and ready for sale and delivery approximately one hundred thousand (100,000) barrels of war beer, containing not more than two and three-quarters per cent. of alcohol by weight.

67 6. On the said 28th day of October, 1919, the corporation had on hand and in its possession about one hundred (100,000) thousand barrels of non-intoxicating war beer. The sale price of said war beer was an average of seventeen dollars ($17.00) a barrel, and the value of the said war beer on hand was approximately one million ($1,000,000) dollars, and based upon the cost of materials

and manufacture, the said war beer could be sold at the prevailing market price to net to the corporation a profit of approximately two hundred thousand ($200,000) dollars.

7. On the said 28th day of October, 1919, the said corporation had purchased and on hand, or contracted to purchase twenty-five car loads of grits commonly used in the manufacture of beer, each of said car loads containing approximately sixty thousand (60,000) pounds, and being of the value of three and 35/100 dollars ($3.35) per hundred weight, or in all the sum of over fifty thousand dollars ($50,000). Said corporation had purchased and on hand or contracted to purchase two hundred and sixty-five thousand (265,000) bushels of malt of the value of one and 64/100 dollars ($1.64), valued in all at more than four hundred and twenty-five thousand dollars ($425,000), and said corporation further had on hand on the 28th day of October, 1919, approximately two hundred thousand (200,000) pounds of hops of the value of ninety cents ($.90) per pound, valued in all at in excess of one hundred eighty thousand ($180,000) dollars.

8. The said corporation also had on hand, on the said 28th day of October, 1919, considerable quantities of sugar and other materials used in the manufacture of war beer; large numbers of
68 kegs or barrels in which to place the same before offering it for sale, and large numbers of bottles and steel packing cases or beer boxes, which it uses in the distribution of its product.

9. On the 28th day of October, 1919, the said corporation had and still has in its employ upwards of seven hundred (700) men, most of whom are trained and experienced in the manufacture of beer, and who have been employed by the said corporation for a long period of time, and the weekly payroll for said employees amounts to between twenty and twenty-five thousand dollars ($20,000-$25,000).

10. I am informed and believe that if Title I of the so-called National Prohibition Act is valid and enforced, the said corporation will be prohibited from manufacturing its said product; that the said corporation will no longer be enabled to engage in the manufacture of war beer as aforesaid; that all property wherein said product is manufactured, sold, kept for sale, or bartered in violation of the said title of said Act will become a public and common nuisance, and any person maintaining such nuisance will be guilty of a misdemeanor and subject to fines and penalties; that property owners owning property wherein such nuisance shall be maintained will be liable to have their property subjected to a lien and to sale for the payment of fines and costs assessed against the occupant of such property, and that if there be any violation of the said Act upon leased premises by the lessee or occupant thereof the leases of such premises may be forfeited.

11. If the said corporation should thereafter comply with the terms and provisions of the said title of said Act, its valuable busi-

69 ness and good-will will be destroyed, profits therefrom will be rendered impossible, and the value of the property of said corporation as a going concern will be destroyed and dissipated, its business and staff will be disorganized, and the value of its plant and physical assets will be depreciated to its junk or salvage value only, and great and irreparable injury and damage will be done to the said corporation, and to its stockholders, and the said corporation will be compelled to abandon the conduct of its business entirely. Its manuacturing plant could not, without the expense of a large sum of money, be adapted to any other business.

12. In the event that the said corporation should be compelled to cease the manufacture and sale of war beer, as aforesaid, more than seven hundred employees would be immediately thrown out of work and be, and long remain unemployed, especially since most of the said employees have been connected with said business for a long period of time and are trained and experienced in no other business.

13. In the event that the said corporation should be compelled, by any of the usual processes, to dealcoholize the said stock of one hundred thousand (100,000) barrels of war beer now on hand, the corporation would suffer considerable financial damage, be put to the expense of additional processes of reducing the said war beer to a beverage containing less than one-half of one per cent. of alcohol, and the beverage so made could not be sold except at such a figure as to approximate a loss of profit of over one hundred and fifty thousand ($150,000) dollars.

14. In the event that the said corporation shall be com-
70 pelled to cease the manufacture and sale of war beer, it will suffer large financial loss on account of the materials now on hand and for the purchase of which it has already contracted. Its packages, including kegs, bottles and boxes in which said product is delivered, will be rendered useless to the said corporation, and the said corporation will suffer the loss of a large part of the value thereof.

15. More than three thousand parcels of real property in which the product of the said corporation is sold or offered for sale *which* will become liable to liens for penalties provided by the said title to said Act, and most of these are premises leased to the complainant's customers.

16. In case the provisions of the said title to said Act are enforced against the said corporation, the said corporation will be compelled to abandon its business, inasmuch as the said corporation has never, at any time, heretofore engaged in the manufacture and sale on a commercial basis of a beverage containing less than one-half of one per cent. of alcohol, and has built up no trade in respect of said beverage. In my opinion, based upon information from persons and corporations engaged in the manufacture of a beverage containing less than one-half of one per cent. of alcohol, the said

corporation could not continue profitably in the manufacture of said beverage, as I have been advised that in certain localities where corporations have ceased the manufacture of lager beer and entered upon the business of the manufacture and sale of such a beverage as a malt liquor containing less than one-half of one per cent. of alcohol, the demand, and consequently the sale, has decreased at least eighty per cent. from the former volume of demand and sale for malt liquors.

71 17. During the three years from 1916 to 1918, both inclusive, the said corporation paid approximately the following sums as taxes and license fees to the following governmental authorities, including advance for account of its customers to be repaid to it by the latter, to wit:

Year.	United States internal revenue.	State and City of New York.
1916	$1,664,000	$879,000
1917	2,189,000	822,000
1918	2,715,000	505,000

18. The average net profits of its business during the three years from 1916 to 1918, both inclusive, were in excess of one million dollars ($1,000,000) per annum.

19. As required by statute of Congress and the Internal Revenue Regulations said corporation has duly given and filed a brewer's bond in the penal sum of one million three hundred and fifty thousand dollars ($1,350,000) binding it faithfully to comply with all the requirements of law relating to the manufacture and sale of malt liquors.

JACOB RUPPERT.

Sworn to before me this 29th day of October, 1919.

[NOTARIAL SEAL.]

BYRON CLARK, JR.,
Notary Public Kings Co.

Cert. filed in N. Y. Co.

72 *Affidavit of Hobart Amory Hare.*

District Court of the United States, Southern District of New York.

In Equity.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Hobart Amory Hare, being duly sworn, deposes and says as follows:

I. I reside at 1801 Spruce Street, in the City of Philadelphia, State of Pennsylvania, and am by profession a physician, having been admitted to practice medicine in 1884.

II. I am Professor of Therapeutics, Materia Medica and Diagnosis in the Jefferson Medical College, Philadelphia, and have been such for the last 28 years. Prior to that time I was demonstrator of experimental therapeutics in the University of Pennsylvania. During the last 28 years I have been visiting physician to the Jefferson Hospital and to other hospitals. I received the degree of M. D. from the Medical School of the University of Pennsylvania in 1884, and Bachelor of Science in 1885. I am a member of
73 the following societies: American Physiological Society, Association of American Physicians, American Medical Association, and the Pathological Society of Philadelphia.

III. I am the author of the following works: "Text Book of Practical Therapeutics with Special Reference to the Application of Remedial Measures in Disease and Their Employment upon a Rational Basis," octavo of 1023 pages, 17th edition, published in 1918 by Lea & Febiger of Philadelphia and New York, which said work has been translated into the Chinese and Korean languages; "Diagnosis in the Office and at the Bedside, the Use of Symptoms and Physical Signs in the Diagnosis of Disease," octavo of 548 pages, 7th edition, published in 1914 by Lea & Febiger; "Text Book of the Practice of Medicine for Students and Practitioners," octavo of 969 pages, 3rd edition, published in 1915 by Lea & Febiger; "National Standard Dispensatory, Containing the Natural History, Chemistry, Pharmacy, Actions and Uses of Medicines," in conjunction with Charles Caspari, Jr., Phar. D., and Henry H. Rusby, M. D., octavo of 2081 pages, 3rd edition, published in 1916 by Lea & Febiger; and of various essays dealing with the action of drugs upon the human body. As the author of the

above works and as editor of the Therapeutic Gazette for the past 29 years, I have made a special study of the scientific literature with respect to alcohol both as a drug and a beverage. As a physician to various hospitals in times past and particularly during the last 29 years, at the Jefferson Hospital in the city of Philadelphia, I have made special study of the effects of alcohol as an intoxicant
74 and as a drug. I am thoroughly informed as to the work of Dr. John Marshall and Dr. Harry L. Hollingworth, whose investigations I suggested.

IV. The power or influence of a given substance introduced into the body by ingestion is determined by the quantity and concentration of that substance. In general terms the greater quantity and the greater the concentration, the greater the effect, and conversely the smaller the quantity and the greater the dilution, the less the effect. As alcohol is not a substance that can be considered foreign to the body, definite amounts of alcohol being produced in the human body daily, the effects which alcohol produce upon or in the body are governed entirely by the quantity ingested and by the ability of the body to deal with a substance with which it is qualified to deal. A considerable quantity of 50 per cent. solution of alcohol when taken undiluted may by its rapid absorption into the blood produce a condition commonly called intoxication or drunkenness, whereas if the same quantity of alcohol were highly diluted it would be less rapidly absorbed and less likely to intoxicate. During the time that the alcohol is being slowly absorbed into the blood, the body is busily engaged in oxodizing, destroying or eliminating it. The quantity of alcohol that finds its way by absorption into the blood, when an alcoholic beverage of low alcoholic content is ingested is less than, or in direct proportion to, the total amount of fluid ingested. The experimental work of Mellanby for the British Control Board, and of Dr. Marshall with beer of an alcoholic content of 2.75 per cent. by weight, has shown that this is true.

To cause approximately equal amounts of alcohol to be in-
75 gested by the drinking of beer with an alcoholic content of 2.75 per cent. by weight and beer with an alcoholic content of one-half of one per cent. by volume by two subjects respectively, the subject taking the half per cent. solution would consume approximately seven times the quantity than the subject taking the 2.75 per cent. solution. While the actual quantity of alcohol ingested by both subjects under these conditions would be about the same, the proportion of the quantity of alcohol absorbed into the blood by each subject would be very different. The subject taking the one-half of one per cent. beer would absorb much less of the alcohol into his blood in a given unit of time than the other subject, because each quart of half of one per cent. would contain only about one and one-quarter teaspoonful of alcohol. This conclusion is justified by the experiments of Dr. John Marshall and a consideration of the work done by Dr. Mellanby at the instance of the Central Control Board (Liquor Traffic).

V. When the quantity of liquid, whether it be beer or other fluid, is swallowed, the water and alcohol contained therein do not go into the blood at once, but gradually as the body can take it and the body will take up fluid from the alimentary canal only as it can get rid of it. This statement has a definite scientific basis. Possibly the most sacred function of the body is the maintenance at a fixed level in the fluids of the tissues and in the blood itself of mineral salts equivalent to 0.9 per cent. of common salt. The absorption of water is dependent upon the ability of the kidneys (chiefly) and the skin and lungs to get rid of the liquid and if the kidneys do not get rid of it, there is arrest of absorption, so that the blood may main-
76 tain its normal salinity. Therefore, if a man drinks two quarts of water he urinates it out as fast as it is absorbed, or sweats it out, or purges it out. Two quarts of beer with an alcoholic content of one-half of one per cent. by volume is not absorbed at once in toto when ingested, but as the body can manage to take it up from the stomach into which it has been poured and this is only as fast as the body can get rid of the water in such beer or combine it with salts already in the body. The alcohol in weak solution is absorbed as the water is absorbed or more slowly. Nature will not allow its blood stream and tissue fluids to be diluted below the equivalent of 0.9 per cent. of saline because this percentage is necessary to life. In other words, speed of intake is balanced by speed of outgo. Water or beer is absorbed because it passes by osmosis as a fluid of low salinity or tonicity into the body tissues of comparatively high salinity in obedience to the law of osmotic pressure. When fluids in the stomach and bowels have a higher salinity than the tissue fluids, the fluid in the tissues pours into the bowels to dilute that salinity. We see, therefore, that even though the stomach were kept constantly filled to capacity with beer of an alcoholic content of one-half of one per cent. by volume, that nevertheless, neither the water nor the alcohol in such beer would go into the blood at once, but gradually as the body can take it. The absorption into the blood of alcohol contained in such beer is, therefore, extremely slow and its destruction, oxidation or elimination sufficiently prompt to prevent at any time a person reaching any degree of intoxication from the drinking of such beer.

77 VI. The classification of beer with an alcoholic content of one-half of one per cent. by volume as intoxicating, is not in the least degree supported by any scientific research, investigation, theory or knowledge and is purely arbitrary.

HOBART AMORY HARE.

Sworn to before me this 27th day of October, 1919.

[NOTARIAL SEAL.]

MARMADUKE D. SMITH,
Notary Public,
N. W. Cor. 15th & Pine Sts., Phila.

My Commission Expires Jan. 28, 1923.

78 *Affidavit of John Marshall.*

District Court of the United States, Southern District of New York.

In Equity.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

John Marshall, being duly sworn, deposes and says as follows:

I. I reside at 1718 Pine Street, in the City of Philadelphia, State of Pennsylvania, and am by profession a chemist and physician, having been admitted to practice medicine in 1878.

II. I am Professor of Chemistry and Toxicology in the Medical School of the University of Pennsylvania in the City of Philadelphia, which position I have held for upwards of twenty years past. I was graduated from that University in 1878, with the degree of M. D., and thereafter pursued special studies in chemistry in Europe, at the Universities of Goettingen and Tuebingen, from which
79 latter institution I was graduated in 1882 with the degree of Nat. Sc. D.

III. I have for some years past made a study of the writings and reports of experimental work of numerous recognized authorities on alcohol and its physiological action upon the human organism, and particularly with respect to its intoxicating effects and in addition have conducted experiments upon human beings to study such effects.

IV. A malt beverage containing as little as one-half of one per cent. of alcohol by volume is not intoxicating. The human stomach could not at any one time hold sufficient of such a fluid, nor could a person drink sufficient thereof to produce a condition of intoxication or drunkenness; nor would there be sufficient alcohol in any such beverage if drunk by an individual to his full capacity to produce any abnormal mental or physical condition whatever, or the loss of ordinary control of the mental faculties or bodily functions. The capacity of the ordinary human stomach is about three pints. The average glass of beer when full to the brim contains eight fluid ounces, and allowing for the usual quantity of foam, the actual quantity of beer in such a glass is about six fluid ounces. The quantity of alcohol which would be contained in such a glass of beer or

six fluid ounces were the beer to contain one-half of one per cent. of alcohol by volume would be about fourteen drops (assuming the drop of alcohol as of the size of a drop of water) or about one-quarter of a teaspoonful. To ingest by means of such beer, the equivalent of one-half a fluid ounce of alcohol, which is equivalent approximately to one tablespoonful, would require the drinking of about sixteen such glasses of the beer, or about three quarts; stated in other
80 words, it would take three quarts of such beer (which is double the capacity of the ordinary stomach) to make a total alcohol content of one tablespoonful.

V. The published results of experiments made by Schweisheimer, a European chemist, and which results have been recognized by the Central Control Board (Liquor Traffic) of England as authoritative, show that the presence of 0.134 of one per cent. to 0.153 of one per cent. of alcohol in the blood produces a condition generally recognized as intoxication or drunkenness. In the case of drunkenness in which 0.134 per cent. by volume of alcohol was found in the blood, the man ingested 3.45 fluid ounces of absolute alcohol in the form of wine. Assuming that the alcohol would be absorbed at the same rate from a dilute solution containing one-half of one per cent. of alcohol as it was absorbed from the stronger solution administered by Schweisheimer, which would not be the case, then to have become similarly intoxicated upon beer containing one-half of one per cent. by volume of absolute alcohol, the man would have had to drink at one time at least twenty-one and one-half quarts of such beer, which is more than seventeen times the capacity of the normal human stomach.

VI. During the month of April, 1919, I conducted experiments upon three male human subjects to determine what, if any, intoxicating effects might follow the ingestion by such subjects of quantities of beer with an alcoholic content of 2.75 per cent. by weight, which equals approximately seven times one-half of one per cent. by volume. Two of the subjects each drank within five min-
81 utes one quart eight and one-half fluid ounces (1 qt. 8½ fl. oz.) of beer with an alcoholic content of 2.75 per cent. by weight each ingesting thereby a total quantity of 1.4 fluid ounce of absolute alcohol. One of the subjects drank the beer at 9.00 A. M. and tests were made of the alcoholic content of his blood taken at 9:30, 10:30, 11:30 A. M. and at 12:30, 2:30 and 4:30 P. M. The second subject drank the beer at 10:00 A. M. and tests were made of the alcoholic content of his blood taken at 10:30 and 11:30 A. M. and at 12:30, 1:30, 3:30 and 5:30 P. M. The quantity of alcohol found in the blood thereafter at the highest point of concentration was about one-quarter the amount which Schweisheimer reports as necessary to produce intoxication. To have introduced by absorption into the blood the same approximate quantity of alcohol by the ingestion of beer containing one-half of one per cent. of alcohol by volume would have required the subjects to ingest at one time upwards of eight and one-half quarts of the beer, that is, upwards of

six times the capacity of the human stomach which obviously is a physical impossibility. In the experiments referred to, the subjects were not in the least degree intoxicated. Had the subjects consumed a quantity of beer containing one-half of one per cent. by volume of absolute alcohol measured by six times the capacity of the human stomach (were it possible to ingest such a quantity) they still could not have been intoxicated. A test of their blood would have shown that they had not sufficient alcohol in the blood to have the subjects regarded in any way as intoxicated.

82 VII. The classification of a fluid as intoxicating which contains as little as one-half of one per cent. of alcohol by volume is not justified by any scientific facts, or knowledge, or by human experience, and in my opinion such a classification is entirely arbitrary.

(Signed) JOHN MARSHALL.

Sworn to before me this 27th day of October, 1919.
[NOTARIAL SEAL.] MARY E. LOGAN,
Notary Public.

Commission Expires February 21, 1923.

83 *Affidavit of Smith Ely Jelliffe.*

District Court of the United States, Southern District of New York.

In Equity.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Smith Ely Jelliffe, being duly sworn, deposes and says as follows:

I. I am a physician, duly registered and licensed to practice in the State of New York, and have been so licensed and registered since 1889.

II. I am a graduate of Columbia University, with degrees of M. D. A. M., and Ph. D. I first served as Interne in St. Mary's Hospital, Brooklyn, 1889–1890, and in the hospitals of Vienna, Paris, London, in 1890–'91–'92. I engaged in general practice in 1890–1893. I was assistant pathologist, Methodist-Episcopal Hospital, Brooklyn, for

three years, and Clinical Assistant to the Board of Health, Brooklyn, and became instructor and later professor of toxicology and
84 pharmacognosy in Columbia University, Department of Pharmacy, in 1894, and held such position for a period of about fifteen years. I was Clinical Assistant in the Department of Neurology, Columbia University, for ten years, from 1900 to about 1910; visiting neurologist in the City Hospital, an institution under the jurisdiction of the Department of Charities of the City of New York, having about three hundred beds for acute and chronic nervous troubles; professor of psychiatry, Fordham University, for about five years until about 1914; instructor in materia medica, College of Physicians & Surgeons of the City of New York, Columbia University, 1906 to 1910; associate professor of nervous and mental diseases, Post-graduate Hospital and Medical School, New York City, 1913 to 1918; consulting Neurologist, Manhattan State Hospital, Ward's Island, for the past fifteen years. I have been managing editor of a publication called Journal of Nervous and Mental Diseases since 1900.

III. I first became interested in the action of alcohol while I was an instructor at Columbia University. I made special experimental studies for four or five years, including psychological investigations as well with students and animals. I made a number of extensive experimental studies with animals and men on changes in the nervous tissues due to acute and chronic poisoning, alcoholic and otherwise. I made studies on multiple neuritis, Korsakow psychosis and the mentality of the alcoholic, morphine, heroin, alcohol and other drug addicts. In addition I have seen thousands of acute and chronic alcoholic cases in the wards of the City Hospital, Bellevue, Bloomingdale Hospital, the Government Hospital for the
85 Insane, Binghamton State Hospital, Hospital of La Salpetriere in Paris and the Charity Hospital in Berlin, and to a great extent I have made psychological investigation in private practice of patients addicted to the various grades of alcoholism.

IV. Until very recently there was no available data that can be said to be scientific or medically reliable concerning the possible intoxicating effects of beer with low alcoholic content. The experiments conducted by Dr. John Marshall of Philadelphia with respect to beer with an alcoholic content of 2.75 per cent. by weight, which I have carefully considered in detail, clearly show that the alcohol in beer of such strength is slowly absorbed into the blood and rapidly oxidized and that the maximum concentration of absolute alcohol in the blood at any one time in his subjects was about a uarter of the amount which the experiments of Schweisheimer showed might produce intoxication. I personally observed on the evening of April 23rd, 1919, an experiment made upon six male human subjects to determine what, if any, intoxicating effect might follow the ingestion by such subjects of the greatest quantity of beer with an alcoholic content of 2.75 per cent. by weight which the subjects could consume. These experiments were conducted under the supervision and direc-

tion of Charles A. Rosewater, M. D., of Newark, N. J., and are referred to by him in his affidavit. From my personal observation of the subjects, from their conversation and conduct, I am of the opinion that that each drank to satiety and none manifested the slightest symptom of intoxication.

V. I have read the affidavit- of Dr. John Marshall and of
86 Dr. Hobart Amory Hare in this proceeding and the statements therein contained are based upon the best and most reliable scientific data that is now available concerning alcohol and its action on the human organism.

VI. There is no scientific justification whatever for the classification of a malt beverage containing as little as one-half of one per cent. of alcohol by volume, as intoxicating and such classification does violence to all scientific principles, theory and knowledge and is entirely arbitrary.

SMITH ELY JELLIFFE.

Sworn to before me this 27th day of October, 1919.
[NOTARIAL SEAL.] G. M. PRESSINGER,
Notary Public.

New York County No. 172. New York Register No. 10122.

87 *Affidavit of William John Gies.*

District Court of the United States, Southern District of New York

In Equity.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

STATE OF NEW YORK,
County of New York, ss:

William John Gies, being duly sworn, deposes and says as follows:

I. I am 47 years of age and reside at No. 609 West 115th Street, Borough of Manhattan, in the City of New York, and am professor of Biological Chemistry in the School of Medicine of Columbia University.

II. I received the following degrees from Pennsylvania College: Bachelor of Science in 1893; Master of Science in 1896 and Doctor

of Science in 1914, and from Yale University the degree of Bachelor of Philosophy in 1894 and Doctor of Philosophy in 1897.

III. I was assistant to Professor Chittenden of Yale from 1894 to 1898 at the Sheffield Scientific School of Yale University and for five years more, that is, from 1898 to 1903, I assisted Professor 88 Chittenden in the Laboratory of Physiological Chemistry in the School of Medicine of Columbia University, of which Professor Chittenden during that period was the non-resident director. I have held the following university positions in relation to teaching and research in Biological Chemistry:

Assistant in Physiological Chemistry, Yale University, from 1894 to 1898; instructor in Physiology, Yale University, from 1895 to 1898; instructor in Physiological Chemistry, Columbia University, from 1898 to 1902; adjunct professor of Physiological Chemistry, Columbia University, from 1902 to 1905; professor of Biological Chemistry, Columbia University, from 1905 to date; professor of Biological Chemistry, New York College of Pharmacy, from 1904 to date; professor of Biological Chemistry, Teachers' College, Columbia University, from 1909 to date. I am a member of the following societies, admission to which is determined by experience and achievement in original investigation: American Philosophical Society, American Physiological Society, American Biochemical Society (Secretary, 1906 to 1909); American Pharmacological Society, American Chemical Society, Society for Experimental Biology and Medicine (Secretary, 1903 to 1909; President, 1917 to 1919).

IV. I have had general experience in biological chemistry and have done original work in that field. I have been an investigator since 1895 of the effects of foods, poisons and other substances, including alcohol, on the bodies of plants, animals and human beings. I have conducted many analyses of the parts of plants, animals and human beings for the identification in them of normal and 89 abnormal substances, including alcohol. I have published many papers on the results of my investigations since 1896 in leading American journals devoted to original research. I am at the present managing editor of two research journals, namely, the Biochemical Bulletin and the Journal of Dental Research; also editor of the Biological Department of Chemical Abstracts.

V. Considering the fact well established that the amount of alcohol necessarily present in the blood to induce intoxication must be from about 0.134 to 0.153 of one per cent., the question arises whether the accumulation of this minimum proportion is affected by any of the qualities of such a beverage as beer. It is obvious, of course, that the smaller the proportion of alcohol in the beer, the greater must be the volume of the beverage taken in order to present a quantity of alcohol that would yield in the blood this minimum proportion. But the greater the volume of beer taken into the stomach, the sooner the sense of satiety is attained and the weaker becomes the inclination to take a quantity of this beverage sufficient to yield this minimum proportion of alcohol to the blood.

VI. For a person to become intoxicated from the drinking of an alcoholic beverage, it would be necessary for him to ingest sufficient (absolute) alcohol in such beverage to occasion the loss of ordinary control of his mental faculties or bodily functions to a substantial extent. A person could not ingest sufficient beer with an alcoholic content of one-half of one per cent. by volume, to cause to be absorbed into his blood sufficient (absolute) alcohol to produce such a result. If the average stomach were filled to its capacity with
90 such beer, there would be about one-quarter of a fluid ounce of alcohol present in the stomach, or about one-half of a tablespoonful. Such a small quantity of alcohol in so highly a diluted condition would have no intoxicating effect whatever upon the individual who so ingested it.

VII. During the month of May, 1919, I conducted two series of experiments with two men and three women as subjects to determine if beer with an alcoholic content of 2.75 per cent. by weight was intoxicating. Each of the male subjects drank six full twelve ounce bottles of such beer. Each of the female subjects drank from five to nine full twelve ounce bottles of such beer and none of the subjects became intoxicated. Had the beer used in this test been of an alcoholic content of one-half of one per cent. by volume, it would have required approximately seven times the quantity taken by the subjects to have caused such subjects to ingest the equivalent amount of alcohol. It is apparent that if beer containing 2.75 per cent. of alcohol by weight failed to intoxicate, that beer containing approximately one-seventh of that quantity of alcohol could not possibly intoxicate.

VIII. The classification of a malt beverage containing as little as one-half of one per cent. of alcohol by volume as intoxicating, is not justified by any scientific facts, knowledge or experience, and is entirely arbitrary.

(Signed) WILLIAM J. GIES.

Sworn to before me this 27th day of October, 1919.

[NOTARIAL SEAL.] THEO. ROGER BRILL,
Notary Public, New York County, No. 252.
New York Register, No. 10030.

91 *Affidavit of Charles A. Rosewater.*

District Court of the United States, Southern District of New York.

In Equity.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Charles A. Rosewater, being duly sworn, deposes and says as follows:

I. I am 44 years of age, and am a practitioner of medicine, duly licensed to practice in the States of New York and New Jersey, and I reside at No. 47 South Street, Newark, New Jersey.

II. I was graduated from the College of Physicians & Surgeons in the City of New York with the degree of M. D. in 1899. Thereafter I served on the house staff of various hospitals and dispensaries. For the past fourteen years practically all of my professional activities have been devoted to the study of treatment of persons addicted to the use of alcohol and narcotic drugs, as well as to the study and treatment of mental and nervous diseases. I have studied the
92 literature on alcohol and its physiological action upon the human organism and particularly its intoxicating effects. I have carefully considered the reports of the experimental work of Dr. John Marshall of Philadelphia and of Prof. Harry L. Hollingworth of New York City. I conducted practical tests to determine whether or not an ordinary man could drink enough beer containing 2.75 per cent. by weight of alcohol to render him intoxicated. In these experiments conducted by me, the subjects were of various ages, of varying habits with respect to the use of alcoholic beverages and from widely diversified calling. The subjects consumed from thirty-six ounces to one hundred and eighty-seven ounces of beer with an alcoholic content of 2.75 per cent. by weight and none of them manifested the slightest sign of drunkenness or intoxication.

III. I have calculated that three quarts of beer with an alcoholic content of one-half of one per cent. by volume would contain about one tablespoonful of absolute alcohol. A person to ingest a tablespoonfulful of absolute alcohol by the drinking of such beer, would have to consume a quantity greater than twice the capacity of the

human stomach. In view of the results of the experimental work above referred to, a malt beverage containing as little as one-half of one per cent. of alcohol by volume, could not possibly intoxicate. The stomach is not sufficiently large to receive a quantity of such a fluid to permit the absorption into the blood of a quantity of alcohol that could possibly have an intoxicating effect. Beer with an alcoholic content of 2.75 per cent. by weight contains about seven times the quantity of alcohol that is found in beer with an alcoholic
93 content of one-half of one per cent. by volume. The experiments conducted with respect to beer with an alcoholic content of 2.75 per cent. by weight conclusively prove that there is no justification whatever for considering a malt beverage with an alcoholic content of one-half of one per cent. by volume as intoxicating.

IV. The classification of a beverage with an alcoholic content of one-half of one per cent. by volume as intoxicating, being contrary to all scientific facts, theory or knowledge and to all human experience, is entirely arbitrary.

CHARLES A. ROSEWATER.

Sworn to before me this 27th day of October, 1919.
[NOTARIAL SEAL.] ROBERT OLIVER,
Notary Public, Kings County, No. 55.
Cert. Filed in New York County, No. 25.

94 *Affidavit of Harry L. Hollingworth.*

District Court of the United States, Southern District of New York.

In Equity.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Harry L. Hollingworth, being duly sworn, deposes and says as follows:

I. I reside at 417 West 118th Street, Borough of Manhattan, New York City, and am 39 years of age.

II. I was graduated from the University of Nebraska with the Degree of A. B. in 1906 and from Columbia University in 1909 with

the degree of Ph. D. I have been connected with the Department of Psychology of Columbia University since 1909, first as instructor in 1909, then as assistant Professor in 1914, and as associate Professor since 1916. I am the author of the following publications:

The Inaccuracy of Movement, Archives of Psychology, Columbia University, Science Press, 1909, 87 pages.

95 Influence of Caffein on Efficiency, Archives of Psychology, Columbia University, Science Press, 1912, 166 pages.

Advertising and Selling, Appletons, New York, 1913, 314 pages.

Experimental Studies in Judgment, Archives of Psychology, Columbia University, Science Press, 1913, 119 pages.

Outlines for Experimental Psychology, Seiler, 1913, 112 pages.

Advertising, Principles and Practice (With Tiper, Parsons and Hotchkiss) Ronald Press, New York, 1915, 575 pages.

Vocational Psychology (With a Chapter by Leta S. Hollingworth) Appletons, New York, 1916, 308 pages.

The Sense of Taste (With A. T. Poffenberger) Moffat, Yard & Co., New York, 1919, 200 pages.

Applied Psychology (With A. T. Poffenberger) Appletons, New York, 1917, 237 pages.

Psychology of Functional Neuroses (Note: Just going to press).

And of numerous original articles in various scientific journals.

III. In June, 1919, I conducted certain experiments to determine what effect beer with an alcoholic content of 2.75 per cent. by weight when consumed in varying quantities to the maximum quantities which the subjects could during a period of time consume, would produce upon the various functions and processes of such subjects. The subjects were six men, ranging from 21 to 29 years of age, and including total abstainers, as well as occasional users of alcoholic beverages. The tests were conducted between June 4th and

96 June 20th, 1919, in a psychological laboratory adequately equipped for the purpose. Mental processes which are ordinarily disturbed by alcoholic intoxication were selected for measurement. They included the following:

1. Steadiness of hand. In order to test tremor, trembling or unsteadiness, a metal plate was used containing small holes into which the subject was required to hold a metal pointer without allowing the pointer to touch the sides of the holes any oftener than he could help. One minute was allowed for each test; the steadier the hand, the fewer contacts would be made and hence the smaller would be the score. In this way it was possible to measure by definite means the steadiness of the arm when the hand was extended holding the pointer.

2. Co-ordination of eye and hand. This was a test of ability to accurately aim and to handle an instrument with precision. The apparatus consisted of a triangular plate of wood with metal inserts in each corner; at the base of each insert was an electrical connection. The subject was required to touch the bottom of each small opening with a metal pointer, thereby completing an electric circuit

which would make a record. The subject was instructed to g about the triangle counter clock wise, striking each target as quickl as possible, not proceeding until a target was successfully struck going from target to target, striking each in turn as rapidly as pos sible. One minute was allowed for this performance. The scor consisted of the number of hits made in that time, disturbances o co-ordination of arm and eye being shown by reduced scores.

97 3. Speed of tapping. This was to test the rapidity of move ments. The apparatus consisted of a metal plate and a metal pointer. The subject was required to tap the metal plat with the metal pointer as rapidly as possible for one minute; each tap caused a complete electrical circuit and was recorded by an elec trical counter.

4. Control of the speech mechanism. The subject was tested in the naming of colors. The apparatus consisted of a large card printed with a hundred small squares of color, red, blue, green, yellow and black appearing in random order, each color occurring twenty times on the card. To name these colors as rapidly as possible in the order in which they occur was the test given to the subject, the time required for the correct performance being measured by means of a stop watch recording in fifth-seconds. When a color was incorrectly called, the experimenter said "no" and the subject had to give the name correctly before proceeding. In this way scores were made.

5. Mental calculation. A card was provided upon which was typewritten fifty two-digit numbers in two long vertical columns. The subject was required to take the card and at the signal "go" to begin with the first number on the card and add seventeen to it mentally and speak aloud the answer. Then he took the next number and so on through the list. If his answer was wrong, the experimenter said "no" and the correct answer had to be given before proceeding. The time required for fifty correct additions was measured by means of the stop watch. This was a test for higher mental processes.

6. Logical relations. Upon a test card there was typewritten a list of fifty adjectives. The subject was required to look at
98 each card and speak aloud, not the word that was written, but instead a word of opposite meaning. Thus, if the word was "idle" he would respond "busy" or "occupied." If he made a mistake the experimenter would say "no." He was required to give satisfactory response before proceeding. The time required for the subject to complete the list in this manner was measured by means of a stop watch.

7. Quickness of learning. A card containing one hundred regular geometrical figures of five varieties and in random order was given each subject. A key was provided indicating a letter of the alphabet as belonging to each of the five forms printed on the sheet. At the word "go" the subject turned the blank over, face up, and

consulting the key which lay before him, wrote in each geometrical form the correct letter according to the key. Taking each form in turn he continued thus throughout the blank. Rapid learning will show itself by ability to get free from the key quickly, thus making it unnecessary to look back and forth from blank to key. Two minutes was allowed for the test.

8. Pulse rate. At each round of the laboratory the pulse was taken over one minute or a thirty seconds period. This was done in a very accurate and direct way by means of a specially designed apparatus.

The quantities of beer with an alcoholic content of 2.75 per cent. by weight that were administered to the subjects ranged from three twelve and a half ounce bottles to nine of such bottles of beer. On certain days called "blank" days no beer was given, on other days called "control" days, a mixture with approximately the
99 same constituents as beer, but without alcohol, was administered, so that the subjects did not know that they were not having beer on those days. In order to have a unit as a basis for comparison of results, the unit in every case was the average proficiency in the forenoon of a given day before any beverage was taken, so that the record is in terms of per cent. of the forenoon efficiency.

The average effect of three to six bottles of such beer containing 2.75 per cent. of alcohol by weight, in the steadiness test was about half as great as the influence upon steadiness of the amount of caffein contained in two ordinary cups of coffee and the unsteadiness produced by three or four bottles of such beer is approximately equal to that produced by the eating of a hearty meal. The influence of drinking three or four such bottles of 2.75 per cent beer upon coordination, control of speech mechanism and logical relations is entirely comparable in amount (although in some cases different in direction) to the effect produced on the same processes by the amount of caffein contained in two ordinary cups of coffee. The influence of the same quantity of such beer in the tapping and mental calculation tests is somewhat greater, but different in direction. Upon the pulse rate the effect is that of acceleration and is about half the amount of the effect of eating a hearty meal. In the remaining tests for quickness of learning no data is available for comparison with the effects of caffein.

IV. As the quantity of alcohol contained in beer with an alcoholic content of one-half of one per cent. by volume is approximately one-seventh of the amount contained in beer with an alco-
100 holic content of 2.75 per cent. by weight, the experiments that I conducted above referred to, form an excellent basis to determine what, if any, intoxicating effects would be produced by the drinking of the one-half of one per cent beer. It will be noted that the effects of three to four bottles of beer on the steadiness test was about equivalent to that following the eating of a hearty meal and yet to cause to be ingested the same quantity of alcohol

by the drinking of one-half of one per cent. beer, would require the drinking, if such were possible, of about twenty-one such bottles of a half of one per cent. beer. In other words, the effects of drinking about twenty-one, twelve and a half ounce bottles of half of one per cent. beer would as far as concern the effects of the alcohol therein contained, produce on the steadiness test not more than the effects that would be produced from the eating of a hearty meal. Similarly the drinking of twenty-one such bottles of beer of half of one per cent. of alcohol as far as concerns the effects of the alcohol therein contained on the co-ordination, control of speech mechanism and logical relations tests, would be no greater than the effects of the caffein in two cups of coffee, although opposite in direction, and upon the pulse rate there would be acceleration of about one-half of the amount produced by the eating of a hearty meal and only in the tapping and mental calculation tests would there be a greater effect from drinking of such a large quantity of the half of one per cent. beer than would be recorded from the effects of the caffein in two cups of coffee.

V. From a consideration of my experiments above referred
101 to and the experiments of others concerning the effects of alcohol upon the various processes of the body and of all of the scientific literature on the subject of alcohol and its effects on the human organism, it is my judgment that the classification of a beverage containing one-half of one per cent. of alcohol by volume as intoxicating is without any scientific warrant whatever, and is entirely arbitrary, for such a beverage cannot be considered an intoxicating beverage.

(Signed) HARRY L. HOLLINGWORTH.

Sworn to before me this 29th day of October, 1919.

GEORGE H. KEAN,
[NOTARIAL SEAL.] *Notary Public, Kings Co.* 222.

Certificate filed in New York Co. 285.

My Commission expires Mch. 30-1921.

(Endorsed:) Copy received Oct. 31/19 5/10 P. M. Francis G. Caffey. W. J. E.—Copy received Nov. 1/1919 at 9:15 A. M. Richard J. M. Elligott, U. S. District Court, S. D. of N. Y. Filed Nov. 7, 1919.

102 *Motion to Dismiss.*

Filed Nov. 3, 1919.

District Court of the United States, Southern District of New York.

In Equity. Docket No. E 16-251.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue for the Third District of New York, Defendants.

The United States Attorney for the Southern District of New York, named as a defendant in the above entitled suit, protesting that the District Court of the United States for the Southern District of New York has no jurisdiction to entertain the bill of complaint herein, hereinafter referred to as the bill, and not waiving this objection, but now and at all times hereafter insisting thereon, moves that the bill and divers parts thereof be dismissed, and assigns the following grounds for this motion, to-wit,

First. The suit in effect is one against the United States and the bill does not aver or show that the United States has consented to be sued herein.

Second. The bill on its face shows that by the suit it is sought to enjoin and restrain the United States Attorney for the Southern District of New York from performing his official duty with respect to the enforcement of civil and criminal statutes of the United States of a general and public nature.

Third. The Court has no jurisdiction to grant the relief prayed for or any part thereof.

Fourth. The bill does not present a cause of action in equity under the Constitution of the United States.

103 Fifth. The bill does not disclose a cause of action equitable in its nature, civil in its character, and arising under the Constitution of the United States.

Sixth. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

Seventh. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

Eighth. The complainant seeks to present again, in a suit between the same parties and tendering the same issues of law, only questions

of law which have been finally determined adversely to complainant in a previous suit in this Court.

Ninth. The War existing on November 21, 1918, still continues and there has been no proclamation of the exchange of ratifications of the treaty of peace, nor has the President proclaimed the date of demobilization, and of these facts the Court should take judicial notice to negative the allegations contained in the VIII paragraph of the bill and the allegations in said paragraph should be stricken from the bill as manifestly irrelevant and impertinent.

Tenth. The Court judicially knows that the state of war which existed between the United States and Germany on November 21, 1918, has not ceased and that the President of the United States has not ascertained or proclaimed the fact or date of such termination or proclaimed the fact of the demobilization of the Army as alleged in the bill and that the war which existed on the 21st day of November, 1918, has not been concluded and the date of such conclusion has not been determined or proclaimed by the President and the allegations in paragraph IX of the bill and exhibits III, IV and V therein referred to, do not show that the said war has been concluded or terminated or that demobilization has terminated and said allegations and exhibits should be stricken out and dismissed from
104 the bill as insufficient, irrelevant and impertinent.

Eleventh. The Court judicially knows that the destruction of property arising as an incident to the going into effect of the prohibition law is not a taking of property for public use without just compensation or a deprivation of property without due process of law and the allegations in paragraph X of the bill that beer containing less than one-half of one per cent of alcohol, by volume, cannot be profitably substituted by complainant in its business for the war beer it is now manufacturing and selling and that the majority of its customers would not purchase said beer and that others would purchase it only in small quantities and that the market for such beer will be much smaller and that the complainant cannot convert its present stock of said war beer into beer containing less than one-half of one per cent of alcohol by volume without loss are insufficient and irrelevant and should be stricken from the bill as manifestly impertinent.

Twelfth. The allegations that the same amount and kind of materials are used to produce and manufacture beer containing one-half of one per cent of alcohol by volume as are used to manufacture an equal quantity of beer containing two and three quarter per cent of alcohol, by weight, are irrelevant and insufficient and should be stricken from the bill as manifestly impertinent.

Thirteenth. The allegations in paragraph XII of the bill, of the number of establishments in the United States brewing malt liquors containing more than one-half of one per cent of alcohol, by volume, the number of persons they employ, the amount of their actual capital investment and actual payrolls, the aggregate value of their

product and total barrelage, the amount of taxes paid to the
105 United States and to various States, and the industries with which said brewing businesses are related or which are dependent thereon and the total value of the dependent industries, are irrelevant and insufficient and should be stricken from the bill as manifestly impertinent.

Fourteenth. The Court judicially knows that the United States Attorney is not subject to suit for the recovery of any damages for his conduct of the office of the United States Attorney and as to him the allegations of the XIV paragraph of the bill should be stricken therefrom as manifestly insufficient, irrelevant, unfounded and impertinent.

Wherefore this defendant says that he should not be held to answer to the bill or to the several allegations thereof above referred to, but that said bill should be dismissed and said several allegations should be stricken therefrom with costs to this defendant.

Dated, New York, N. Y., November 1, 1919.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York, Solicitor pro se.

U. S. District Court, S. D. of N. Y. Filed Nov. 3, 1919.

106 *Affidavit of Richard J. McElligott.*

Filed Nov. 3, 1919.

District Court of the United States, Southern District of New York. In Equity.

E. 16-251.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

Richard J. McElligott, herein impleaded as the Acting Collector of Internal Revenue in and for the Third District of New York, named as a defendant in the above entitled suit and sued herein as Acting and Deputy Collector of said District, protesting that the District Court of the United States has no jurisdiction to entertain the bill of complaint herein, moves that the bill of complaint herein, hereinafter referred to as the bill, and divers parts thereof be dismissed and assigns the following grounds for this motion, to wit:

First. The facts alleged in the bill are not sufficient to constitute a valid cause of action in equity.

Second. The suit in effect is one against the United States and the bill does not aver or show that the United States has consented to be sued herein.

Third. The Court has no jurisdiction to grant the relief prayed for or any part thereof.

Fourth. The bill does not present a cause of action in equity under the Constitution of the United States.

107 Fifth. The bill does not disclose a cause of action equitable in its nature, civil in its character, and arising under the Constitution of the United States.

Sixth. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

Seventh. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

Eighth. The war existing on November 21, 1918, still continues and there has been no proclamation of the exchange of ratifications of the Treaty of Peace, nor has the President proclaimed the date of demobilization, and of these facts the Court should take judicial notice to negative the allegations contained in the VIII paragraph of the bill and said allegations in said paragraph should be stricken from the bill as manifestly irrelevant and impertinent.

Ninth. The Court judicially knows that the state of war which existed between the United States and Germany on November 21, 1918, has not ceased and that the President of the United States has not ascertained or proclaimed the fact of the demobolization of the Army as alleged in the bill, and that the war which existed on the 21st day of November, 1918, has not been concluded and the date of such conclusion has not been determined or proclaimed by the President and the allegations in the IX paragraph of the bill and Exhibits III, IV and V therein referred to, do not show that the said war has been concluded or terminated or that demobilization has
108 terminated and said allegations and exhibits should be stricken out and dismissed from the bill as insufficient, irrelevant and impertinent.

Tenth. The Court judicially knows that the destruction of property arising as an incident to the going into effect of the Prohibition Law is not a taking of property for public use without just compensation or a deprivation of property without due process of law and the allegations in the X paragraph of the bill that beer containing less than one-half of one percent of alcohol, by volume, cannot be profitably substituted by claimant in its business for the war beer it is now manufacturing and selling and that the majority of its customers would not purchase said beer and that others would purchase it only in small quantities and that the market for said beer will be much

smaller and that the claimant cannot convert its present stock of said war beer into beer containing less than one-half of one percent, by volume, without loss are insufficient and irrelevant and should be stricken from the bill as manifestly impertinent.

Eleventh. The allegations that the same amount and kind of materials are used to produce and manufacture beer containing one-half of one percent, by volume, as are used to manufacture an equal quantity of beer containing two and three-quarter *present* of alcohol, by weight, are irrelevant and insufficient and should be stricken from the bill as manifestly impertinent.

Twelfth. The allegations in the XII paragraph of the bill of the number of establishments in the United States brewing malt liquors containing more than one-half of one percent of alcohol, by volume, the number of persons they employ, the amount of their actual capital investment and actual payrolls, the aggregate value of their
109 product and total barrelage, the amount of taxes paid to the United States and to various States, and the industries with which said brewing businesses are related or which are dependent thereon and the total value of the dependent industries, are irrelevant and insufficient and should be stricken from the bill as manifestly impertinent.

Wherefore, this defendant says that he should not be held to answer to the bill or to the several allegations thereof above referred to, but that said bill should be dismissed and said several allegations should be stricken therefrom with costs to this defendant.

Dated, New York, N. Y., November 1, 1919.

FRANCIS G. CAFFEY,
United States Attorney for the Southern District of New York, Solicitor for the Defendant Richard J. McElligott.

U. S. District Court, S. D. of N. Y. Filed Nov. 3, 1919.

110 *Affidavit of Richard J. McElligott.*

Filed Nov. 15, 1919.

United States District Court, Southern District of New York.

E. 16-251.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

Affidavit.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Richard J. McElligott, being duly sworn, deposes and says:

1. I am the Acting Collector of Internal Revenue in and for the Third District of New York referred to in the first paragraph of the bill of complaint filed herein.

2. That up to the time of the making of this affidavit I have received no instructions from the Commissioner of Internal Revenue or the Secretary of the Treasury or from any superior administrative officer of the United States government by which I have been given any duties with reference to the enforcement of the Act of November 21, 1918, or the Act of October 28, 1919.

3. To the best of your deponent's knowledge, information and belief the active enforcement of the Acts of November 21, 1918, and October 28, 1919, has been delegated by the Commissioner of Internal Revenue to the Supervisor of Revenue Agents, Custom House, New York, and that your deponent has received no instructions as to the procurement of evidence of violations or been directed
111 to assign any of his subordinates to this work nor has deponent any jurisdiction or control over the Revenue Agents of the Treasury Department who have been assigned to the duty of procuring evidence and discovering violations of the Acts of November 21, 1918, and October 28, 1919; that as your deponent understands his duties in the premises, he is under the legal duty and obligation of reporting to the United States Attorney any violations of these Acts of Congress, which are reported to deponent and he has such duties as are provided for in the Revised Statutes dealing with the discovery of unstamped beer; That your deponent has not reported to the United States Attorney for the Southern District of New York a single case of the violation by any brewer of the provisions of the

Act of November 21, 1918, or the provisions of the Act of October 28, 1919.

4. That deponent, as Acting Collector of Internal Revenue for the Third District of New York and as Deputy Collector of Internal Revenue for the Third District of New York for a period of over three years, in the performance of his official duties, has come in contact with many hundreds of persons engaged in the business of selling beer and distilled spirits; That deponent has some knowledge of the conditions under which the business of selling beer both from the wholesale and retail trade is carried on, which knowledge has come to him through his experience as an official of the United States, and to the best of deponent's knowledge, information and belief, from 75% to 80% of the saloons doing business in deponent's district do so under heavy mortgages running in favor of the breweries on their stock, furniture, fixtures and chattels, and that in a great many cases the beer is shipped to the saloon-keeper on a consignment basis and in a great many cases the state licenses
112 of the saloon-keeper are paid for by the brewery, and to the best of your deponent's knowledge, the situation of many of the saloon-keepers is such as to put them under the virtual control of the brewers from whom they purchase their beer.

5. As Acting Collector I no longer have entire charge within the Third District of New York of all the agents, servants, subordinates and employees of the Bureau of Internal Revenue. There is now in existence as hereinabove stated a body of agents for the purpose of discovering and obtaining evidence of violations of the Internal Revenue laws particularly the Acts of November 21, 1918, and October 28, 1919, under a separate supervising director and over this class of agents I have been given no jurisdiction or control whatever.

6. I have never at any time and so far as I am informed and believe, no agent, servant, subordinate or employee of the Collector or Acting Collector of Internal Revenue for the Third District, has ever expressed any intention of seizing or forfeiting property as alleged in the paragraph numbered thirteen in the bill of complaint, and deponent has made inquiries among other officers who have served in the Bureau of Internal Revenue with respect to whether there is any provision, law or regulation either authorizing or requiring the seizure or forfeiture of property of brewers for failure to comply with either of said Act- of Congress or with any Proclamation, regulation or ruling thereunder. So far as deponent has been able to ascertain from such inquiries, there is no provision of law and there is no regulation which either requires or authorizes any such seizure or forfeiture except for fraud. The only forfeiture or seizure
113 authorized either by law or by regulation relative to beer or to brewers is for failure to pay or evasion or efforts to evade the paying of taxes due or owing to the government.

RICHARD J. McELLIGOTT.

Sworn to before me this 5 day of November, 1919.

[Seal Hazen S. Master, Notary Public, Kings County.]

H. S. MASTER,
Notary Public.

Kings County No. 294. Certificate filed in New York County No. 233. New York County Register's No. 1303. Commission Expires March 30, 1921.

U. S. District Court, S. D. of N. Y. Filed Nov. 15, 1919.

114 *Opinion, Learned Hand, D. J.*

Filed Nov. 14, 1919.

United States District Court, Southern District of New York.

E. 16–250.

ALPHONS DRYFOOS and Others

against

WILLIAM H. EDWARDS, Collector of Internal Revenue.

E. 16-251.

JACOB RUPPERT, INC.,

against

FRANCIS G. CAFFEY, United States Attorney, and RICHARD J. McELLIGOTT, Deputy Collector of Internal Revenue.

These cases came up on motions by the plaintiffs for temporary injunctions. In the first case the motion was to enjoin the collector from interfering with the withdrawal and sale for beverage purposes in the United States of certain distilled spirits. In the second the motion was to enjoin the district attorney and the deputy collector from enforcing the penalties against the plaintiffs of Title I of the National Prohibition Act because of its proposed sale of non-intoxicating beer containing more than one-half of one per cent. and not more than 2.75% of alcohol.

The defendants moved in each case to dismiss the bills.

The bills present the question of the constitutionality of the
115 War Time Prohibition Act and of Title I of the National Prohibition Act, which establishes a definition of the words "beer, wine or other intoxicating malt or vinous liquor," as used in the War Time Prohibition Act, and provides a procedure for the en-

forcement of the earlier act. In the first case the plaintiffs allege that they are the owners of four hundred and seventy-four packages of distilled spirits, which had been lawfully made before the War Time Prohibition Act went into effect or had been passed (at least it is conceded that the bill shall be so understood), and which had been entered or deposited for storage in government warehouses and transferred in bond. That the defendant had refused to permit the withdrawal of any such distilled spirits and continued to refuse it. That the armistice between the German Government and the United States was accepted on November the eleventh, 1918, and that the United States in its various departments has suspended all war-time activity and has demobilized its forces, as appears from official communications of the President. That its army and navy has been reduced to less than its peace quota and that various other of the interruptions of normal industry and intercourse occasioned by war have terminated. That the only constitutional basis of the War Time Prohibition Act was under the war powers of the government, and had ceased to exist, so that the act itself was no longer in force.

The second bill alleges that the plaintiff is the owner of three plots of real estate in the City of New York to the value of nearly two million dollars, on which is erected a brewing plant with all its equipment to the value of over ten million dollars. That it
116 has been engaged in the manufacture of malt liquors since 1910 to an annual amount of more than eight million dollars. That since January first, 1918, it has discontinued the manufacture and sale of beer of more than 2.75% alcohol, which does not intoxicate. That it had on hand on October twenty-eighth, 1918, a large number of barrels of beer containing 2.75% of alcohol, on which day Congress passed Title I of the National Prohibition Act, making its sale thereafter illegal. That for some six months before October twenty-eighth, 1919, no general emergency had existed warranting such prohibition by Congress either military or otherwise. That the armistice had been accepted by Germany and Austria on November eleventh, 1918, and that the President had proclaimed that prohibition was no longer necessary on October twenty-seventh, 1919, in a message in which he vetoed the National Prohibition Act. That in this message he had proclaimed that the army and navy had been demobilized and the other objects of the War Time Prohibition Act had been satisfied. That this was in fact the case, and that most of the boards of governmental instrumentalities appointed to carry on the war had been disbanded. That the effect of Title I was to destroy the valuable business and goodwill of the plaintiff, to dissipate its staff of employees and to reduce its plant to a junk or salvage value only. That the act is unconstitutional and that the defendants, in enforcing the same, will be acting without warrant of law.

117 The plaintiff in the second case submitted certain affidavits supporting in detail the allegations of the bill, showing that the reduction of the beer on hand from 2.75% to one-half of one per cent. of alcohol will involve the loss of a large sum of money, also showing that the use of 2.75% beer was not intoxicating.

The whole point in issue is the constitutionality of the two acts,

the first as affecting the plaintiffs in the first suit and the second as affecting the plaintiff in the second suit.

Walter C. Noyes, M. J. Stroock, Arthur L. Strasser for Alphons Dryfoos and others.

Elihu Root, William D. Guthrie, William L. Marbury for Jacob Ruppert, Inc.

William L. Frierson, Francis G. Caffey and Earl B. Barnes for the Defendants.

LEARNED HAND, *D. J.*:

The War Time Prohibition Act was passed on November twenty-first, 1918, ten days after the acceptance of the terms imposed by the Allies upon the German Government and when the Empire had fallen. The circumstances were then such as made patent to everyone that successful hostilities could not be resumed and, as the President declared to Congress a few weeks later, the war had come to an end. If, therefore, the war powers of Congress were dependent upon the prosecution of further hostilities in the field, they had ceased. However, no one urges that this was the case. Everyone agrees that to some extent at least Congress had the power to take steps necessary to insure the observance of the terms of the armistice and to demobilize the forces which had been called to the
118 colors. The second admission is, however, significant to this extent, that it concedes that the powers of Congress do not terminate at once with the cessation of hostilities, but that they include the power to restore, in certain respects anyway, the status quo ante bellum. It therefore becomes necessary to inquire how far the powers of Congress go to that end.

It seems to me rather a barren question whether the so-called war powers are to be drawn from the express power "to declare war", though that has been said at times, Miller v. U. S. 11 Wall. 268, 305, ex parte Milligan, 4 Wall. 2, 139 (per Chase, C. J.), or whether it is to be found in the added power "to raise and support armies", or whether it is to be inferred from the fact that the United States is the only sovereign recognized among the world of nations, within the territory of the United States, at once responsible and vested with any of the powers which are customarily exercised by such a sovereign so charged, Juilliard v. Greenman, 110 U. S. 421, 447, 449, 450. The real question is of the limits after the cessation of hostilities of the powers of Congress to unravel the results which war has caused. That it has some such powers, as I have said, cannot be denied. The forces must be demobilized, the unnecessary accumulation of supplies must be sold, the railroads must be returned, or some other valid status given them, the ships, built and building, must be disposed of, contracts must be cancelled, and the immense organization of workmen and of factories and machinery must be restored to the general industrial life of the nation. So much at least is within the powers of Congress, and in the execution
119 of its powers it is not limited narrowly, Veazie Bank v. Fenno, 8 Wall. 533, The Legal Tender Cases, 12 Wall. 457.

Now I cannot see why it should be thought a legitimate concern of Congress to deliver its soldiers and workmen to the places whence they came, and yet be held totally beyond its ken to inquire into the conditions which they must meet upon their arrival. The nation is today the employer of thousands of men upon the railways which it holds not by virtue of the interstate commerce clause, but under its war powers. It has discharged some four million soldiers and immense numbers of workmen from industries suddenly discontinued by the war. The inevitable industrial adjustments, which so enormous and sudden an influx into the industries of the country involve, are a direct and immediate result of the war. They are one of the consequences of a return to a peace footing quite as inextricably involved in the prosecution of war, as the disposal of its accumulated supplies and munitions. As to the last, Congress might prescribe rules as to how they should be marketed, perhaps indeed might even regulate their prices till the effect of the new supply was absorbed. Is not the same rule to apply to its men? The responsibility for some adequate provision against the immediate results of military and industrial demobilization is national, because it was the nation for its own purposes that chose to produce them. No doubt the States might in a measure deal with them, but the nation has neither the duty nor the right to abandon the problems that it alone has raised. It was for war that these men were taken from
120 their work; it was for war that unaccustomed duties were imposed upon them; and it may prove of vital importance in another war whether the nation disregards all further duty to them, as soon as they are discharged.

Now a policy of prohibition rests, or at any rate may rest, upon the belief that the use of intoxicating drink will provoke discontent, disorder, economic waste, and industrial friction and maladjustment among this class and during this period. With the correctness of that belief of course I have nothing to do; it is enough that it has been long and very widely held. If so, the only question, as I view it, is whether such prohibition has any genuine relation to this object, though hostilities be over, demobilization completed and the production of military supplies and munitions have ceased. Prohibition may not be the measure of our national responsibility,—but it is obviously a step which honest men may believe to look to its discharge. Nor can it be said that the means were more extended than the occasion required, for it is apparent that it may not be practical to prohibit the sale of intoxicants to demobilized soldiers, workmen and to railway employees without including the community at large. They permeate every corner of the land and mingle freely and indistinguishably with all citizens. Constituting no longer an ascertainable class, they cannot be kept from access to intoxicants unless the prohibition be general. Whether the result is worth the sacrifice, whether it was in fact the reason for the decision of Congress, whether it was necessary to include all kinds of intoxicants, even the milder beverages, may indeed be open to doubt, but those are matters which the court may not consider.

121 I need not inquire whether Congress could extend such a law beyond the declaration of peace. Apparently it was thought that its war powers so extended still further in Stewart v. Kahn, 11 Wall. 493, in a case quite dissimilar on the facts. In any event, I do not of course suggest that under such a guise Congress might indefinitely legislate for the country at large. But most constitutional problems in the end resolve themselves into the question, how far, and there is no royal road to their solution by rhetorically conjuring up outrageous possibilities which may arise from their unflinching application. All I need do here is to say that until the declaration of peace Congress has power to deal with a matter directly arising from the prosecution of war and so I hold.

But it is said that the statute itself shows that its purpose was to extend only until demobilization and that it must fail when that purpose is accomplished. Ignoring the rule that preambles are not in any case controlling, Price v. Forrest, 173 U. S. 410, 427, U. S. v. Webster, 23 Fed. Cas. 16,658, the recent action of Congress shows that whatever its original purpose, it now means to continue the measure, regardless of the purposes of the preamble. Title I of the National Prohibition Act was passed over the veto of the President in which he said that demobilization was complete and that the other original purposes of the act were fulfilled. It would be preposterous to suppose that Congress repassed the act, because it disagreed with that statement. The only possible explanation is that it had other purposes in mind, as indeed the plaintiffs stoutly assert.

122 But Title I was avowedly ancillary to the War Time Prohibition Act and designed to make it effective. It assumes the existence of that act, and if the latter had indeed come to an end, because its purpose had been accomplished, the second statute would, I think, have revived it, if Congress had power to do so. And even if Title I of the later act be not such a revival, the language of the earlier is too explicit to admit of the necessary interpretation from its preamble. Judged merely by its language it meant to impose prohibition for a period not yet completed, and if that period went beyond the declared purposes, it was not on that account invalid, provided it could depend upon other powers which Congress actually had, but did not expressly invoke. No statute need recite all the grounds which may be urged for its validity.

Again it is earnestly insisted that as used in the act, the phrase "conclusion of the war" meant cessation of hostilities. I do not regard that question as material. Even if it were true, the statute by its terms was not to end until the President proclaimed demobilization. That he certainly has not done. He may be right or wrong in his understanding of the law, but it has nothing to do with the fact that he has not yet done that which Congress meant him to do to bring the statute to an end, and until he does, it endures.

I am content to accept for argument's sake the rule suggested by the plaintiffs, that the validity of a statute must depend upon the state of facts at the moment when it impinged upon the individual. Following the intimations obiter in Perrin v. U. S. 232 U. S. 478,

486, Johnson v. Geralds, 234 U. S. 422, 447, I agree that the
123 War Time Prohibition Act may have been valid in July (Hoffman v. McElligott, 259 Fed. R. 525), and in August, (Scatena v. Caffey, N. Y. Law Journal, August 26, 1919), and yet be invalid in November. But the question now is, whether on the later day, notwithstanding the completion of its original purposes, it was invalid, because Congress had no power to pass it. I have already given the reasons which lead me to an opposite conclusion.

However, the plaintiffs say, granted that Congress might have had an independent power to pass the act if the President had concurred, as between Congress and the President, I must accept the decision of the latter, since upon him is laid the whole responsibility for the conduct of war. As I understand this argument it involves the premise that while Congress may declare war and presumably may place in the President's hand the means for its successful prosecution, he alone may determine when the occasion has arisen for their use, and that, speaking concretely, since he has said that there is no further occasion for war-time prohibition, Congress had no independent power to continue it in operation. Such a doctrine has no support in authority, and the practice in war has not tended to give it support. Nor does it appear to have any basis in principle. The President is, it is true, the Commander in Chief of the armed forces of the United States and their ordering and disposition rests with him, as does that of all the supplies and munitions which Congress may provide. Yet provision for a state of war is not vested in the President. He can enact no rules of general conduct, he can levy no troops, cannot supply them or take any steps to put the
124 country in a posture of war, except as Congress agrees to delegate such powers to him. Nor is it, I think, the practice of any democratic country that the executive should have such powers. It would be an anomalous situation if he might terminate rules which Congress had prescribed but which he could not initiate. That he might decline to use his powers is true enough, but the plaintiffs here need more than that; they must assert that he may alone absolve citizens from a rule laid down by Congress, because in his judgment it is no longer necessary. I cannot help thinking that this is exactly parallel with a dispensing power.

Finally, it is urged that even though the war powers extend so far, they are still subject to constitutional limitations, among them to the Fifth Amendment, ex parte Milligan, supra. That position would be entirely answered by Mugler v. Kansas, 123 U. S. 623, even were the prohibition permanent. The language in the Fifth Amendment must mean what it does in the Fourteenth, and that is not a wrongful taking of property at the hands of Congress, which is not at those of a State. But this prohibition is not permanent, since it will end when peace is declared. That the plaintiffs in the first case will lose their whisky by mere delay cannot be. The plaintiff in the second case will indeed be unable meanwhile to make anything but one-half of one per cent. beer, which it says it cannot sell, and that is a genuine financial injury, but it does not result in the taking of its brewery, though the time be reckoned in months.

As to its existing beer, it may be abolished at once, even though at a loss, or, for all that appears, it may keep under refrigeration till peace is declared.

125 The real sting of the law arises from the incidence of the Eighteenth Amendment on January sixteenth, 1920, for it may indeed come true that there will be no interval during which existing stocks of liquors may be sold. Yet I cannot say that it is the War Time Prohibition Act which produces that result. Its validity must depend upon its effect, and its effect is only to stop the sale of intoxicants for a time. If the Eighteenth Amendment meanwhile gives a coup de grace to the industry, the death lies at its door. That is at least a complete answer to the plaintiff's claim in the second case that its brewery will be destroyed. If it be thought too formal and unreal an answer as to the existing stocks of liquor or of beer, since the days for sale may be altogether taken away, I can only answer that it does not yet appear that there will be none such or how many they will be. No one can say when peace will be declared; in the case of Germany it would surely be wrong to dispose of the case upon the theory that there would be no reasonable interval. In the case of Austria, whatever the probabilities, they are not such as allow of any certain determination. It may indeed be that in the end the plaintiffs will never be able to dispose of their stocks in the United States. Whatever justice there be in compensating them for their loss, it is not such that courts will make it a condition upon the validity of the law.

I hold, therefore, that the War Time Prohibition Act still remains a valid exercise of Congressional power, and the only question left is of Title I of the National Prohibition Act, in so far as it

126 includes what on this record I must accept to be non-intoxicating beer. As to that I can say little more than that the power to include it falls squarely within the rule of Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, and the earlier case of Silz v. Hesterberg, 211 U. S. 31. Though the sole justification of the War Time Prohibition Act be to prohibit the sale of intoxicants, it may be impossible effectively to accomplish that end without including all kinds of beer. The same rule must apply to Congress as to a State legislature.

Judge Brown in the case of Narragansett Brewing Co. v. Baker & Shaunessy, decided November 12, 1919, has held that the year granted by the Eighteenth Amendment positively accords that period during which no prohibition legislation can be enacted. It would follow of course that, had active hostilities continued through the year 1919, Congress would have been unable to prevent any sale of intoxicants at all. I should suppose that consistently the argument must apply to sales in the neighborhood of cantonments, though that would perhaps have been too strong a position to assert. With deference, it appears to me that the Eighteenth Amendment in giving a year's grace did not intrude upon the existing powers of Congress, whatever they were, any more than it intruded upon the powers of the States to regulate traffic in intoxicants domestically. The year was free, so far as the

Amendment itself prohibited the business, but it left Congress in untrammelled possession of its power to wage war.

127 Finally, the plaintiff in the second case says that even though I conclude, as I do, that the laws are constitutional, it should have a temporary injunction pending appeal. The Supreme Court is to hear argument upon the constitutionality of the War Time Prohibition Act on Thursday next, and it is reasonable to suppose that an early decision will be reached. The damage done by an injunction meanwhile can not be measured in money, as in the case of Cotting v. Kansas City Stock Yards, 82 Fed. R. 857. Here is a question of national public policy, of allowing the sale of what the constituted authorities apparently regard as injurious to the public or to so much of it as they have the right to consider. To annul their will, if only for a season, is to do an injury which is, to say the least, as irreparable, if the laws be valid, as to prevent the plaintiffs from selling intoxicants for the same period, if they are not. In all the books we are told that to declare a statute unconstitutional we must be assured beyond question that it is such. A temporary stay now is a declaration for a time that it is unconstitutional; it is to dispense with the statute till the case be finally decided. Assuming that I may do so, there seems to be no proper reason for exercising the power.

The motions for preliminary injunction will be denied and the bills dismissed.

I am advised that Judge Knox now has pending before him a demurrer to an information filed against Thomas F. O'Brien and Patrick McEnerny under the War Time Prohibition Act and the National Prohibition Act, in which demurrer the validity of said acts, upon constitutional grounds, is attacked. I am authorized by Judge Knox to say that he agrees with the conclusions which I have reached, and overrules the demurrer for that reason.

L. H.,
D. J.

November 14, 1919.

U. S. District Court. S. D. of N. Y. Filed Nov. 14, 1919.

128 *Order Dismissing Bill.*

Filed Nov. 15, 1919.

At a Stated Term of the District Court of the United States held in and for the Southern District of New York on the 15th day of November, 1919, at the Federal Courts and Post Office Building in the City and County of New York.

Present: Honorable Learned Hand, District Judge.

E. 16-251.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

This cause came on to be heard at this term on the motion of the above named complainant for a preliminary injunction as prayed for in the bill of complaint herein, and upon the motions of the above named defendants to dismiss the bill of complaint herein, and was argued by counsel, and thereupon, upon consideration thereon it was ordered, adjudged and decreed as follows, viz.:

That the motion of the complainant herein for a preliminary injunction be and the same hereby is denied; and it was further ordered, adjudged and decreed

That the motions of the defendants to dismiss the bill of
129 complaint herein be and the same hereby are granted and it was further ordered, adjudged and decreed

That the bill of complaint herein be and the same hereby is dismissed with costs to be taxed.

LEARNED HAND,
U. S. D. J.

U. S. District Court, S. D. of N. Y. Filed Nov. 15, 1919.

130 *Petition for Appeal and Order Allowing Same.*

Filed Nov. 15, 1919.

United States District Court, Southern District of New York.

In Equity.

E. 16-251.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue, Defendants.

Petition for Appeal.

To the Honorable the Judges of the District Court for the Southern District of New York:

The above named complainant conceived itself aggrieved by the final decree herein, dated November 15, 1919, and entered in the office of the clerk of this court on November 15, 1919, dismissing its bill of complaint herein and denying its motion for a preliminary injunction, hereby appeals from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and prays that its said appeal be allowed, that the bond on appeal presented herewith may be approved, and that a citation issue directed to the above-named defendants commanding them to be and appear before the said Supreme Court of the United States upon the return day thereof, that a transcript of the record, proceedings and papers upon which said decree
131 was made, duly authenticated, may be transmitted to said Supreme Court of the United States, and that upon the filing of said appeal bond all further proceedings in this court be suspended until the determination of said appeal by said Supreme Court of the United States.

Dated, New York, November 15, 1919.

ROOT, CLARK, BUCKNER & HOWLAND AND FITCH & GRANT,

Solicitors for Complainant.

The foregoing claim of appeal is allowed and it is ordered accordingly.

Dated, New York, November 15, 1919.

LEARNED HAND,

United States District Judge.

Endorsed: A copy of the within paper has been this day received at this office. Nov. 15, 1919. Francis G. Caffey, U. S. Attorney. U. S. District Court, S. D. of N. Y. Filed Nov. 15, 1919.

132 *Assignment of Errors.*

Filed Nov. 15, 1919.

United States District Court, Southern District of New York.

In Equity.

E. 16-251.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants.

Assignment of Errors.

Now comes the above-named complainant and appellant herein and says that in the record and proceedings of this court in this cause and in the decree made herein on November 15, 1919, and entered in the office of the clerk of this court on November 15, 1919, there is manifest error in this, to wit:—

First. That the court erred in dismissing the bill of complaint herein.

Second. That the court erred in denying complainant's motion for a preliminary injunction.

Third. That the court erred in holding the act of Congress of November 21, 1918, known as the War Prohibition Act, constitutional and valid.

Fourth. That the court erred in holding title I of the act of Congress of October 28, 1919, known as the National Prohibition Act, constitutional and valid.

Fifth. That the court erred in holding said act of Congress of November 21, 1918, to be still operative and in force and effect.

133 Sixth. That the court erred in holding that until the declaration of peace and the termination of the dejure state of war Congress had and has power to prohibit the manufacture and sale of non-intoxicating beer irrespective of the existence or continuance of any war emergency or military necessity.

Seventh. That the court erred in holding that the President had not yet determined and proclaimed the "conclusion of the present war" and "the termination of demobilization," within the meaning and intent of those terms in either of said acts of Congress.

Eighth. That the court erred in refusing to give force and effect to the determinations and declarations of the President, in his various messages to Congress and in his proclamations, concerning the demobilization of the army and navy and the cessation of the war emergencies to which said acts of Congress relate.

Ninth. That the court erred in holding that neither of said acts of Congress takes any of complainant's property without due process of law and without just compensation in violation of the Fifth Amendment to the Constitution of the United States.

Tenth. That the court erred in holding that both of said acts of Congress were and remained valid exercises of the war powers of Congress, and that neither violates or violated any of the powers reserved to the several states in and by the Tenth Amendment to the Constitution of the United States.

Eleventh. That the court erred in holding that neither of said acts of Congress violates any of the terms and provisions of the Eighteenth Amendment to the Constitution of the United
134 States.

Twelfth. That the court erred in holding that the conditions obtaining in November, 1919, warranted the continued enforcement of either of said acts of Congress.

Wherefore, the complainant and appellant prays that said decree of the United States District Court for the Southern District of New York be reversed and a preliminary injunction be granted the complainant as prayed for in its said bill of complaint herein and for such other and further relief as to the court may seem just and proper.

New York, November 15, 1919.

ROOT, CLARK, BUCKNER & HOWLAND, AND
FITCH & GRANT,
Solicitors for Complainant-Appellant.

Endorsed: A copy of the within paper has been this day received at this office. Nov. 15, 1919. Francis G. Caffey, U. S. Attorney.—U. S. District Court, S. D. of N. Y. Filed Nov. 15, 1919.

135 United States District Court, Southern District of New York.

JACOB RUPPERT, a Corporation, Complainant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue, Defendants.

Know all men by these presents, That we, Jacob Ruppert, a corporation, as Principal and Massachusetts Bonding and Insurance Company, a corporation organized and existing under the Laws of the Commonwealth of Massachusetts and having an office and place of business at No. 16 Liberty Street, Borough of Manhattan City of New York, as Surety are held and firmly bound unto Francis G. Caffey, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue, the defendants herein in the sum of two hundred fifty and 00-100 ($250.00) dollars to be paid to said defendants for the payment of which well and truly to be made we bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated the 15th day of November, 1919.

Whereas, the above named Jacob Ruppert, a corporation, has prosecuted an Appeal to the Supreme Court of the United States to reverse the final decree, dated November 15th, 1919, and entered in the office of the Clerk of this Court, on November 15th, 1919, dismissing its bill of complaint herein, and denying its motion for a preliminary injunction.

Now, therefore, the condition of this obligation is such, That if Jacob Ruppert, a corporation, shall prosecute said appeal to effect, and answer all damages and costs, if it fails to make its plea good, then this obligation to be void otherwise same shall be and remain in full force and virtue.

JACOB RUPPERT, A CORPORATION,
By EMORY R. BUCKNER,
Solicitor.
MASSACHUSETTS BONDING AND INSURANCE COMPANY,
By GEORGE E. HAYES,
Assistant Manager.

Attest:
HARVEY SELF,
Resident Secretary.

Justification or Acknowledgment Federal Business. Surety Department, executed November 15, 1919, annexed hereto.

136 Endorsed.

Approved as to form and sufficiency of surety.
Dated, November 15, 1919.

LEARNED HAND,
U. S. D. J.

A copy of the within paper has been this day received at this office.
Nov. 15, 1919.

FRANCIS G. CAFFEY,
U. S. Attorney.

U. S. District Court, S. D. of N. Y., Filed Nov. 15, 1919.

137 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To Francis G. Caffey, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the 20th day of November, 1919, next, pursuant to an appeal, duly allowed by the District Court of the United States for the Southern District of New York, and filed in the office of the clerk of said District Court on the — day of November, 1919, in a cause wherein Jacob Ruppert, a corporation, is the appellant and you are the appellees, to show cause, if any there be, why the decree rendered against said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the District above named, this 15th day of November, in the year of our Lord one thousand nine hundred and nineteen, and of the Independence of the United States the one hundred and forty-fourth.

[Seal District Court of the United States, Southern District of N. Y.]

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

138 [Endorsed.]

United States District Court, Southern District of New York.

E. 16-251.

Jacob Ruppert, a Corporation, Complainant,

against

Francis G. Caffey et al., Defendants.

Original.

Citation.

Root, Clark, Buckner & Howland,

31 Nassau Street, Borough of Manhattan, New York City,

and

Fitch & Grant,

32 Nassau St., Borough of Manhatton, New York City,

Solicitors for Complainant.

A copy of the within paper has been this day received at this office.
Nov. 15, 1919.

FRANCIS G. CAFFEY,
U. S. Attorney.

U. S. District Court, S. D. of N. Y. Filed Nov. 15, 1919.

139 UNITED STATES OF AMERICA,
Southern District of New York, ss:

JACOB RUPPERT, a Corporation, Complainant-Appellant,

vs.

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendants-Appellees.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern

District of New York, this fifteenth day of November in the year of our Lord one thousand nine hundred and nineteen and of the Independence of the said United States the one hundred and forty-fourth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

Clerk's Fee for certifying record, $33.20.

ALEX. GILCHRIST, JR.,
Clerk.

140 [Endorsed:] United States Supreme Court. Jacob Ruppert, a Corporation, Complainant-Appellant, vs. Francis G. Caffey, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, Defendant-Appellees. Transcript of Record. Appeal from the District Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 27,358. D. C. U. S. S. New York. Term No. 603. Jacob Ruppert, a corporation, appellant, vs. Francis G. Caffey, United States Attorney for the Southern District of New York, and Richard J. McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York. Filed November 17th, 1919. File No. 27,358.

FILED
NOV 17 1919
JAMES D. MAHER,
CLERK.

No. 603

Supreme Court of the United States.

OCTOBER TERM, 1919—No.

JACOB RUPPERT, a corporation,
Complainant-Appellant,

v.

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and RICHARD J. MCELLIGOTT, Acting and Deputy Collector of Internal Revenue of the Third District of New York,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE BY COMPLAINANT-APPELLANT.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
Of counsel for complainant-appellant.

Supreme Court of the United States,

OCTOBER TERM, 1919—No.

JACOB RUPPERT, a corporation,
Complainant-Appellant,

v.

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and RICHARD J. MCELLIGOTT, Acting and Deputy Collector of Internal Revenue of the Third District of New York,
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE BY COMPLAINANT-APPELLANT.

Now comes Jacob Ruppert, a corporation, the complainant-appellant herein, and respectfully moves the advancement of the above-entitled cause for early hearing during the present term, and preferably for hearing on the 20th day of November, 1919.

This cause is pending in this court upon an appeal taken by the above-named complainant from a decree dismissing its bill of complaint and denying its motion for a preliminary injunction. The bill of complaint was filed to procure an injunction against the above-named defendants to restrain them from enforcing the terms and provisions of the Act of Congress of November 21, 1918, known as the War Prohibition Act (40 Stat., 1045), and title I of the Act of Congress of October 28, 1919, known as the National Prohibition Act.

The complainant is a large brewing company engaged in the manufacture of non-intoxicating beer containing more than one-half of one per cent of alcohol by volume

but less than two and three-quarters per cent of alcohol by weight, the standard heretofore fixed by the President of the United States in his proclamation of December 8, 1917. By reason of the prohibitions added to said act of November 21, 1918, by title I of the said act of October 28, 1919, the complainant's business is threatened with destruction and irreparable damage if either of said acts be unconstitutional. The bill of complaint herein alleges that said acts are not valid exercises of the war powers of Congress and are unconstitutional. The District Court for the Southern District of New York has overruled the complainant's contentions in this regard and dismissed its bill. In order that it may avoid irreparable damage and secure as adequate a remedy as possible, it is necessary that this court should hear the cause at an early date.

The District Court for the District of Rhode Island has ruled that title I of the act of October 28, 1919, is unconstitutional and void. It is, therefore, in the public interest that the conflict of authority on this question be speedily and authoritatively settled.

The complainant is but one of many brewers similarly situated and its cause is in the nature of a test case on behalf of all brewers making said non-intoxicating beer. More than a billion dollars of property interests and the livelihood of thousands of persons are involved in this controversy.

Notice of this application has been served on the Department of Justice.

November, 1919.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
Of counsel for complainant-appellant.

FILED
NOV 20 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 603.

JACOB RUPPERT, a corporation,

Appellant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and RICHARD J. MCELLIGOTT, Acting and Deputy Collector of Internal Revenue of the Third District of New York,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLANT.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
WILLIAM L. MARBURY,
Of counsel for appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 603.

JACOB RUPPERT, a corporation,

Appellant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and RICHARD J. MCELLIGOTT, Acting and Deputy Collector of Internal Revenue of the Third District of New York,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLANT.

This appeal presents for review a final decree of the United States District Court for the Southern District of New York granting the defendants' motion under equity rule 21 to dismiss the bill of complaint for want of equity.

The complainant is a New York brewing corporation and is engaged in the business of manufacturing and selling non-intoxicating malt liquors containing more than one-half of one per cent. of alcohol by volume, and the bill was filed on its behalf in order to restrain the defendants as federal officers from enforcing against the complainant the terms and provisions of subdivision Fourth of

section 1 of the act of Congress of November 21, 1918, as supplemented and extended in and by title I of the National Prohibition Act of October 28, 1919, upon the ground that such portion of the new act is unconstitutional, and if enforced by the defendants, who are expressly charged with the duty of its enforcement, would irreparably damage the complainant and deprive it of its liberty and property without due process of law or just compensation. The contention of the complainant-appellant, briefly stated, was that at the time when the new act of Congress was passed over the President's veto and went into effect, namely, October 28, 1919, there was in the United States and there is now no war emergency or necessity which warranted any such prohibition of non-intoxicating beverages; that the fact whether such a war emergency or necessity existed is a justiciable question not foreclosed by the assumption of power or any express or implied declaration by Congress; that Congress was without power to prohibit the carrying on of the business of the complainant, which is authorized and legitimate under the laws of the State of New York, and that, therefore, the legislation, if enforced, would deprive the complainant of its liberty and property without due process of law or just compensation, in violation of the Fifth Amendment of the Constitution of the United States as well as of the reserved police powers of the several states under the Tenth Amendment.

STATEMENT.*

It appears from the bill of complaint that the appellant is a New York corporation engaged in manufacturing and selling non-intoxicating malt liquors to be used for beverage purposes. It is a very large concern having real and personal property of the value of over $12,500,000 so invested and employed, doing a business of several millions of dollars each year, dealing regularly with several thousand customers, selling about a million barrels of beer annually, having a good will worth in excess of a million dollars, paying between two and three million dollars a year in taxes, employing over 700 men with a total annual payroll of $1,056,000, and earning profits in excess of $1,000,000 per annum. The property interests involved are, in fact, exceptionally substantial. The State of New York has heretofore derived a revenue of over $22,000,000 per annum from licensing the manufacture and sale of liquors.

Since January 1, 1918, the complainant has been engaged in manufacturing and selling so-called "war beer," which is a non-intoxicating malt liquor containing not to exceed 2.75 per cent. of alcohol by weight. This standard of alcoholic content was fixed by the President of the United States as a war measure in a proclamation dated December 8, 1917, issued under and by virtue of the Food and Fuel Control Law of August 10, 1917. On October 28, 1919, the complainant had on hand over $1,000,000 worth

* As this brief had to be prepared before the record could be printed by the clerk of the court, no references can be made to pages or folios. The motion to dismiss (equivalent to a demurrer under the old practice) of course admits all facts well pleaded.

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If this be done, it will sus-
tain a very large pecuniary loss.

Title I of the National Prohibition Act declares that the words "beer, wine, or other intoxicating malt or vinous liquor" theretofore employed by Congress in the act of November 21, 1918, shall "*hereafter*" mean, not what the words on their face purport to mean, namely, beer and wine which are actually and in fact intoxicating, as the District Court of the United States for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit and nine other United States District Courts have held, but "any beverages which contain one-half of 1 per centum or more of alcohol by volume" (sec. 1, title I). Beer containing as little alcohol as one-half of one per cent. by volume and not to exceed 2.75 by weight (equal to 3.4 by volume) is conceded by the motion to be non-intoxicating, and a declaration to the contrary would be without any basis in fact and arbitrary.

The recent act furthermore adds prohibitions where none is in fact necessary to meet any possible war emergency or necessity that may arise. The Selective Service Law (act of May 18, 1917, ch. 15, 40 Stat. 76) authorizes the President to regulate the prohibition of alcoholic

liquors in or near military camps, prohibits the sale, supply, or possession of intoxicating liquors at any military station, cantonment, camp, etc., and declares it unlawful to sell intoxicating liquor to a soldier in uniform, and this was extended by the act of October 6, 1917, to sailors (ch. 92, 40 Stat. 393). The Food Control Law (act of August 10, 1917, ch. 53, 40 Stat. 276) fully and comprehensively covers the subject, not only of productive efficiency, but of food conservation. And the act of November 21, 1918, expressly grants to the President power to establish zones in and about coal mines, munition factories, shipbuilding plants and other plants for war material and to prohibit the manufacture, sale, or distribution of any intoxicating liquors in such zones. Every possible war emergency or necessity, whether in relation to soldiers and sailors or conservation of food, manpower, or productive efficiency is amply covered and provided for by existing legislation and fully within the power of the President as Commander-in-chief of the army and navy to meet and regulate. The act of October 28, 1919, however, would greatly extend the existing prohibitions and reach *all* classes of civilians in *every* part of the country, prohibiting them, although in nowise in the army or navy or federal service and not even near any demobilization centre, from manufacturing, selling, or using non-intoxicating beverages, which may be nutritious and harmless and form part of the daily food of millions of our citizens.

The bill of complaint further alleges and the defendants' motion admits that there is not now and was not on October 28, 1919, any war emergency such as would

render necessary or proper the prohibitions contained in the acts in question. The matters that sustain these allegations of the bill are all matters of judicial knowledge and current history.*

For nearly a year before the National Prohibition Act of October 28, 1919, became a law, the armistice between the warring powers had been signed and accepted and actual hostilities had terminated, and long prior to October 28, 1919, the enemy had complied with substantially all the terms of the armistice. Under the armistice, the enemy withdrew from invaded territory and evacuated a large area of its own territory on the left bank of the Rhine, which the Allies soon thereafter occupied, surrendered all or the major part of its artillery, machine guns, aircraft, motor transports, railroads in Alsace-Lorraine, submarines, warships, etc., ceased all hostile operations, revealed the location of all mines, made restitution of seized property and reparation for damage done, submitted to a continuance of the Allied blockade, released belligerent and neutral vessels, etc. On the day of the signing of the armistice the President, under his constitutional duty to inform Congress concerning "the state of the Union," declared to both houses of Congress that by the signing of the armistice "the war thus comes to an end; for having accepted these terms of armistice, it will be impossible for the German command to renew it," and "that the object of the war is attained, . . . and attained with a sweeping complete-

* *Jenkins* v. *Collard*, 145 U. S. 546, 560-1; *Caha* v. *United States*, 152 U. S. 211, 222; *Apis* v. *United States*, 88 Fed. 931, 933; *United States* v. *Brewer-Elliott Oil & Gas Co.*, 249 Fed. 609, 610, 619.

ness which even now we do not realize." Since that date the President and numerous executive departments of the Federal Government have repeatedly announced that as matter of fact the war and war emergencies have practically terminated.

The President in his Thanksgiving Proclamation of November 16, 1918, referred to the complete victory which had brought us peace. In his address to Congress on December 2, 1918, he spoke of the secure peace which followed the complete submission of the enemy, of the fact that the enemies' empires were in liquidation, that the restrictions placed upon industry for war purposes had been removed, and that from the very moment of the armistice, "we took the harness off." On November 30, 1918, he approved the recommendation of the chairman of the War Industries Board that this board be discontinued, since it "was only a war-making board," and in his executive order of December 3, 1918, he recognized the cessation of the war activities of the governmental departments. In subsequent statements he has referred to the fact that "the quiet of peace and tranquillity of settled hopes has descended upon us." In his address to the Senate on July 10, 1919, when he presented the treaty of peace, he said once more that "the war ended in November, eight months ago." And in his veto message of October 27, 1919, which dealt explicitly with the existence of war emergencies which might call for prohibition, he expressly declared such emergencies to "have been satisfied in the demobilization of the army and navy."

Previously the President in proclamations dated Jan-

uary 30 and March 4, 1919, issued under the Food and Fuel Control Act of August 10, 1917, had further declared that existing conditions warranted him in permitting the unrestricted use of food products in the making of non-intoxicating liquors. On August 8, 1919, in an address to the Congress, the President proclaimed that there was no shortage of food supplies in the country.

On May 20, 1919, the President reported to the Congress that demobilization had then already proceeded so far that there was no longer any emergency justifying the prohibitions which the act of November 21, 1918, imposed and which the present act of October 28, 1919, would greatly extend and intensify, and in his message of October 27, 1919, he in substance and effect proclaimed that the war emergencies calling for prohibition had passed and that demobilization had been completed. And the War Department has announced that the accident of the war and the process of demobilization were at an end. The present strength of the army is less than 300,000 men, of whom only about 20,000 are in Europe. The personnel of the navy has been reduced to less than its authorized peace quota, and now numbers under 135,000 men.

War contracts have been cancelled as no longer necessary since the cessation of hostilities, and all that now remains to be done with the twenty per cent. of them still undischarged and unreleased, is to adjust the compensation payable to the contractors. War materials and supplies have been disposed of both here and in France. Hospitals, proving grounds, training schools, cantonments, railroad supplies, rolling stock, ships, etc., have

been sold or otherwise disposed of because no longer necessary for any war purpose. The various war boards and instrumentalities created during the pendency of hostilities have nearly all been disbanded and their activities discontinued. The various censorships and wartime administrative regulations imposed upon the country have practically all been rescinded. The cable censorship was discontinued on July 23, 1919, and federal control over the wire system of the country and the cables to foreign lands has been relinquished. Since July 14, 1919, trade, exchange and communication with the peoples of Austria and Germany have been authorized and resumed.

A treaty of peace has been concluded between the allied and associated powers, executed by Germany and ratified by England, France, Italy and Japan, four of the principal allied and associated powers, as well as by Belgium and other signatories. By virtue of article 440 of the treaty, the acceptance thereof by the allied and associated powers referred to makes it operative as between them at once. Demobilization in these other countries has progressed to a very large extent, and in France has been announced to be complete, 4,423,609 officers and men having been mustered out of the French army prior to October 18, 1919.

The provisions of title I of the National Prohibition Act manifestly threaten the complainant's business with destruction. The definition of intoxicating beer which section 1 provides shall apply to the terms of the act of November 21, 1918, would, if valid, render criminal the making or selling of beer containing one-half of one per

cent. or more of alcohol by volume. Innumerable criminal prosecutions can thus be brought against the complainant if it should attempt to continue its present lawful business of making and selling 2.75 per cent. beer, as well as against its officers and employees and its numerous customers. A large number of such prosecutions would disorganize its trained staff of workers, drive them from its employ and ultimately disperse them. Similar proceedings against its customers would at once cause most of them to quit dealing with the complainant and thus destroy the valuable good-will it has heretofore established. Repeated charges of crime against the complainant itself would threaten it with fines aggregating immense sums.

By section 3 of title I of the act of October 28, 1919, any place or vehicle where forbidden liquor is made or sold or kept for sale is declared to be a public and common nuisance, as is also all the property used in such place or vehicle, and any person maintaining or assisting in maintaining such a nuisance is declared to be guilty of a misdemeanor. This criminal provision carries with it the same consequences and dangers which have already been noticed concerning the criminal penalties adopted from the act of November 21, 1918. In addition, section 3 subjects to a lien for all fines and costs the property occupied by such a nuisance and thus casts a cloud upon the title thereof. The section further provides that the violation of title I by a lessee shall give his landlord the right to forfeit the lease. The grave consequences to the complainant which inhere in this provision will be apparent when it is recalled that, as shown by the bill of

complaint, hundreds of the complainant's customers conduct business on leased premises, and could, therefore, be put out of doors if this portion of the National Prohibition Act be valid. Moreover, section 4 empowers the United States attorney to bring a suit in equity to enjoin and abate the nuisances defined in section 3. The immeasurable harm which such abatement proceedings threaten is too apparent to require elaboration.

It is further alleged in the bill of complaint that as prescribed by law (R. S. sec. 3336) the complainant has filed a bond in the sum of $1,350,000, binding it faithfully to comply with all the requirements of law relating to the manufacture and sale of malt liquor. Each time, therefore, that the complainant does an act which violates the statutes in question, the defendant Collector has power to cause the defendant United States attorney to bring suit against it upon its bond, and thus subject the complainant to innumerable actions at law.

Finally, section 3340 of the Revised Statutes provides for forfeitures, penalties and criminal liability where any "owner, agent, or superintendent of any brewery, vessels, or utensils used in making fermented liquors . . . refuses . . . to do, or cause to be done, any of the things by law required to be done by him." Prior to 1879 this statute applied only to "the things by law required to be done by him *as aforesaid,*" which, of course, limited the forfeiture and penalty provisions to matters then enumerated in the statutes. But by the act of March 1, 1879 (ch. 125, 20 Stat. 342), the words "as aforesaid" were stricken out of section 3340, and its operation thus extended to all matters then or thereafter required by

law. It follows, consequently, that, as the complainant, if it continues business, may be regarded as continuously violating title I of the act of October 28, 1919, it, its agents and its property would be liable to a multitude of forfeiture, penalty and criminal proceedings under section 3340 of the Revised Statutes. Forfeiture suits, under the well-settled practice, commence with an executive seizure of the property claimed to be forfeited (*Dobbins's Distillery* v. *United States*, 96 U. S. 395, 396; *Coffey* v. *United States*, 116 U. S. 436, 443; R. S. sec. 3166; 19 Cyc. 1357, 1359), and repeated seizures in successive forfeiture suits would manifestly accomplish the ruin of the complainant's business and property. Section 3213 of the Revised Statutes makes it the duty of the defendant Collector to sue for forfeitures.

By the general law (R. S. secs. 771, 838, 3213) and especially by sections 2, 4, and 5 of the act of October 28, 1919, itself, the defendants are charged with the duty of enforcing the prohibitions contained in title I of that act, and it must be presumed that they will do so if they are not enjoined. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 840; *Williams* v. *Boynton*, 147 N. Y. 426, 431; *Star Co.* v. *Brush*, 103 Misc. 631, 638; *Davis* v. *Berry*, 216 Fed. 413, 415; 242 U. S. 468; *Consolidated Gas Co.* v. *Mayer*, 146 Fed. 150, 151.

The bill further alleges, as showing the vast property interests involved, that the brewing industry of the United States includes 1,250 establishments, employs 75,400 persons with an aggregate annual payroll of more than $80,000,000, has an actual invested capital of

$792,914,000, and an annual product worth in excess of $442,000,000; that in 1918 the taxes paid to the Government by the industry amounted to $126,285,000, and in 1919 the tax upon the same barrelage would equal $301,722,000, and that with their allied and dependent industries, the brewing interests represent an investment value of over one billion dollars of capital. Few suits in equity have ever more clearly involved immense property interests threatened with destruction by and through the enforcement of a statute alleged to be unconstitutional.

Assignment of Errors.

I. That the court below erred in holding that title I of the act of Congress of October 28, 1919, is constitutional and within the war powers vested in the Congress.

II. That the court below erred in holding that the act of Congress of November 21, 1918, was still in full force and effect as against the complainant and others similarly situated.

III. That the court below erred in dismissing the complainant's bill and in refusing the preliminary injunction prayed for.

It may be convenient for reference to state here the principal statutory provisions to be considered by the court.

Thus, the prohibition of the Act of Congress of November 21, 1918, reads as follows:

> "After May first, nineteen hundred and nineteen, until the conclusion of the present war and there-

after until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquors for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. . . .

"Any person who violates any of the foregoing provisions shall be punished by imprisonment not exceeding one year, or by fine not exceeding $1,000, or by both such imprisonment and fine."

This wording, as above stated, has been interpreted by ten District Courts of the United States as not prohibiting the manufacture and sale of non-intoxicating wine or beer, and this aspect of interpretation is discussed at length in a supplemental point filed herewith.

The act of Congress of October 28, 1919, title I, section 1, purports "to provide for the enforcement of war prohibition" as follows:

"The term 'War Prohibition Act' used in this Act shall mean the provisions of any Act or Acts prohibiting the sale and manufacture of intoxicating liquors until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States. The words 'beer, wine, or other intoxicating malt or vinous liquors' in the War Prohibition Act shall be *hereafter* construed to mean any such beverages which contain one-half of one per centum or more of alcohol by volume."

If the act of October 28, 1919, should be held unconstitutional, or if the operation of the act of November 21, 1918, be held to have terminated by reason of the facts heretofore proclaimed by the President (see particularly his veto message of October 27, 1919, printed in full in the appendix to this brief), nevertheless the so-called Lever Food and Fuel Control Act, approved August 10, 1917, would still remain in full force and effect and prohibit the use of food products in the production of distilled spirits and further in section 11 provide that—

> "Whenever the President shall find that limitation, regulation, or prohibition of the use of foods, fruits, food materials, or feeds in the production of malt or vinous liquors for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquor, is essential, in order to assure an adequate and continuous supply of food, or that the national security and defence will be subserved thereby, he is authorized, from time to time, to prescribe and give public notice of the extent of the limitation, regulation, prohibition, or reduction so necessitated. Whenever such notice shall have been given and shall remain unrevoked no person shall, after a reasonable time prescribed in such notice, use any foods, fruits, food materials, or feeds in the production of malt or vinous liquors, or import any such liquors except under license issued by the President and in compliance with rules and regulations determined by him governing the production and importation of such liquors and the alcoholic content thereof."

The appellant brewery company has not and does not contend that the Food and Fuel Act of August 10, 1917, has terminated. On the contrary, this act (see section 24) uses language quite different from that used in the act of November 21, 1918, and provides that it shall only

"cease to be in effect when the *existing state of war* between the United States and Germany shall have terminated, and the *fact* and *date* of such termination shall be ascertained and proclaimed by the President."

The President's proclamations under and by virtue of section 15 of the Food and Fuel Control Act are still in full force and effect, and as such still operate to prevent the brewers of the country from using any food products in the manufacture of intoxicating beer. A perusal of the President's Proclamations of January 30 and March 4, 1919 (see appendix), will show that they only lifted the ban prescribed in his Proclamations of December 8, 1917, and September 16, 1918, so as to permit the manufacture of non-intoxicating beverages, which is all the brewers now ask to be allowed to do. The act of November 21, 1918, moreover, contained the following proviso discussed in the supplemental point, viz.:

> "*Provided further* that nothing in this Act shall be construed to interfere with the power conferred upon the President by section fifteen of the Food-Control Act, approved August tenth, 1917."

It may be added that other war measures are also still in force and effect. For example, the so-called Federal Control of Carriers Act, approved March 21, 1918, and the so-called Control of Communications Act, Joint Resolution of July 16, 1918, are still operative by their very terms, but both provide for compensation and involve the exercise of the power of eminent domain. The former provides in section 14 that it—

> "shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next fol-

lowing the date of the proclamation by the President of the exchange of ratifications of the treaty of peace . . ."

And the latter (the Joint Resolution of July 16, 1918) provides—

"which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided, that just compensation shall be made for such supervision, possession, control, or operation to be determined by the President . . ."

War emergencies are, of course, manifold, and war emergencies requiring the control of food, fuel, transportation and communication may survive the period of actual war activities and hostilities, while at the same time and after the complete demobilization of the army and navy, no war emergency may exist in respect of the manufacture and sale of intoxicating liquors. In other words, each subject matter involves its own effects and considerations, and evidence by means of official declarations may well establish the cessation of one or more war emergencies and the continuance of others.

I.

The war powers of the Federal Government.

It may facilitate the analysis and consideration of the subject of the war powers of the United States Government, if we recall at the outset the provisions of the Constitution of the United States and the powers

therein expressly enumerated or delegated to the Congress and the President.

As to the Congress, the powers enumerated are to be found in clauses 11 to 16 inclusive of section 8 of Article I of the Constitution, as follows:

> "11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
>
> "12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
>
> "13. To provide and maintain a navy;
>
> "14. To make rules for the government and regulation of the land and naval forces;
>
> "15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;
>
> "16. To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

These express grants are supplemented by clause 18 as follows:

> "18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

As to the President, the powers and duties expressly enumerated and delegated to him are contained in Article II as follows:

> "Section 1. The executive power shall be vested in a President of the United States of America . . .
>
> "Section 2. The President shall be Commander

in Chief of the Army and Navy of the United States and of the militia of the several states, when called into the actual service of the United States . . .

"Section 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient . . . . he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."

There can be no doubt that the war powers of the United States under the Federal Constitution are complete and sufficient for all war purposes and comprehend the right to employ any appropriate means found necessary and proper for prosecuting a war and plainly adapted to that end. Recent decisions of the courts have emphasized and illustrated the broad nature and scope of these powers. *Selective Service Draft Law Cases,* 245 U. S. 366, 377; *Northern Pacific Ry.* v. *North Dakota,* 250 U. S. 135, 149; *Salamandra Ins. Co.* v. *N. Y. Life Ins. & Tr. Co.*, 254 Fed. 852, 858. The war powers of the United States, however, are clearly divided between Congress and the President. Whilst all legislative power in connection with war measures is vested exclusively in Congress, all the executive power exercisable in connection with the waging or conducting of war is vested exclusively in the President by virtue, not only of his office as President, but of his powers as Commander-in-chief of the army and navy of the United States. As declared by Mr. Chief Justice Chase in *Ex parte Milligan,* 4 Wall. 2, 139:

"Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President,

> in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President."

There is no suggestion in the argument which is now submitted to the court that would curtail the scope and extent of the war powers of the Congress or the President. Indeed, it may be now conceded that whilst war was being actually waged between April, 1917, and November, 1918, and whilst the country continued on a war-footing with the army and navy not yet demobilized, Congress could, if necessary and proper for the prosecution of the war while raging, or the support of the army and maintenance of the navy pending demobilization, prohibit the use and consumption of food products in the manufacture of beverages, whether or not intoxicating, and prohibit the manufacture, sale and use of intoxicating liquors. But it is urged that any such incidental war power of prohibition, which would necessarily interfere with the liberties and property rights of the people of the United States and the governmental powers reserved to the several states, can be exercised only in cases of existing war emergency or military necessity. In other words, the rights of the states cannot be even temporarily violated unless a war emergency reasonably warrants such action. This follows from the very nature of our federal system and the duty of Congress and the President not to violate the express reservations of powers to the states, embodied in the Tenth Amendment to the Constitution of the United States, or the constitutional rights of the individual. *Hammer* v. *Dagenhart,* 247 U. S. 251, 273, 276; *Keller* v. *United States,* 213 U. S. 138, 144;

Vance v. *Vandercook Co.*, 170 U. S. 438, 444; *Kidd* v. *Pearson*, 128 U. S. 1, 24. As Chief Justice Marshall declared in *McCulloch* v. *Maryland*, 4 Wheat. 316, 405:

> "This Government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist."

Or, as Mr. Justice Story expressed the rule in *Houston* v. *Moore*, 5 Wheat. 1, 48, in discussing a war power of Congress:

> "Questions of this nature are always of great importance and delicacy. They involve interests of so much magnitude, and of such deep and permanent public concern, that they cannot but be approached with uncommon anxiety. The sovereignty of a state in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favour of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the constitution; and, on the other hand, we are bound to support that constitution as it stands, and to give a fair and rational scope to all the powers which it clearly contains."

And in *Hammer* v. *Dagenhart*, *supra* (247 U. S. at p. 275, argued and decided whilst war was being waged) Mr. Justice Day pointed out that—

> "The maintenance of the authority of the States

> over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution."

The business of brewing beer is authorized, licensed and regulated in a number of the states, as in the State of New York, and any legislation of Congress prohibiting the manufacture and sale of beer must necessarily operate to override state policy and authority and state legislation, as well as to deprive many states of a present source of large revenue from taxation necessary for the support and maintenance of their respective state governments. In the State of New York alone, such annual revenue amounted in 1916 to over $21,000,000, in 1917 to over $20,700,000 and in 1918 to over $22,500,000.

Hundreds of millions of dollars are invested in the brewing business and to many thousands of citizens it is their only means of livelihood. The rights of all engaged in such a business, heretofore always expressly authorized and licensed by both federal and state governments, ought not to be subject to selection for violation and destruction under the pretext of the exercise of the war powers of Congress at a time when no actual war emergency or military necessity calls for any such prohibition, and when no other class in the Nation is being subjected to any such prohibition or discrimination or called upon to make any such contribution or sacrifice to the common welfare on any plea whatever. On behalf of the brewers, whose property and business are now threatened with destruction long before the Eighteenth Amendment will become effective as the source of any additional power to Congress or as a limitation upon the reserved

rights of the states and their peoples, it is submitted that the rights and liberties guaranteed by the Constitution of the United States are not suspended and do not cease to be effective guarantees during a period of war, and are not subject to denial or curtailment by war measures, whether by the Congress or the President, unless an actual war emergency or military necessity so requires, and then only during the period of such war emergency or military necessity. *Mitchell* v. *Harmony*, 13 How. 115, 149; *Ex parte Milligan*, 4 Wall. 2, 121; *Raymond* v. *Thomas*, 91 U. S. 712, 716.

II.

The powers and duties of the President.

It was undoubtedly the intention of the framers of the Constitution of the United States to vest in the President the broadest war powers, and to render him independent of Congress in respect of the exercise of those powers in the actual conduct of a war. They did not wish to permit a repetition of the interference by Congress which did so much to embarrass Washington as Commander-in-chief during the Revolution. Speaking of the provision appointing the President Commander-in-chief, Hamilton declared in the Federalist (No. 74 Ford's ed. at p. 496):

> "The propriety of this provision is so evident in itself, and it is at the same time so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them which have, in other respects, coupled the chief magistrate with a council have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those

> qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority."

In Chancellor Kent's Commentaries (vol. 1, p. 282) the following comment will be found:

> "He is commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the service of the Union. The command and application of the public force to execute law, maintain peace, and resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so characteristic of this department, that they have always been exclusively appropriated to it, in every well-organized government upon earth."

Mr. Justice Story in his Commentaries on the Constitution declared (sec. 149) that:

> "The command and application of the public force to execute the laws, to maintain peace, and to resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so peculiarly adapted to this department, that a well-organized government can scarcely exist when they are taken away from it. Of all the cares and concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."

See also Pomeroy's Constitutional Law (secs. 703-714).

And foreign students of our Constitution have commented upon the fact that, whilst the right to declare war belongs to Congress alone, the waging or conduct of war and the use of all means that may be granted for that purpose by Congress, belong exclusively to the President. *E. g.*, Von Holst's Constitutional Law (Mason's translation), pp. 164, 192-195.

The war powers of the President are here emphasized because of the argument below that he is peculiarly qualified under the national system of government established by the Constitution of the United States to determine such questions as the existence or continuance of a war emergency or military necessity, and that his official declarations upon such a subject, in the absence of other criteria, furnish the best evidence which the nature of the case permits, and in the absence of all other evidence is conclusive.

III.

Necessity for existence of an actual war emergency to sustain exercise by Congress of incidental war powers interfering with constitutional rights of states or citizens.

It is submitted that under our federal system the reserved powers of the several states and the constitutional rights, privileges and immunities of individuals and the limitations upon the powers of the Federal Government under the Constitution of the United States continue unimpaired during war times, and that they can be subordinated and interfered with in the exercise of the war powers of the United States only when necessary and proper for carrying any such powers into execution. The federal authority only then becomes paramount and the supreme law. The existence of a war emergency must be the basis and warrant for the exercise of an implied war power which tends to deny the rights of an individual or a state, and the courts are not concluded by the mere declaration of Congress, whether express or

implied, that such an emergency actually exists, or shall be presumed to continue for some indefinite period in the future.

The leading case of *Ex parte Milligan*, 4 Wall. 2, affords a striking and instructive illustration of the constitutional principles now involved. It presented for adjudication an attempt to supersede the guaranties of due process of law and trial by jury by an unnecessary resort to martial law. The act of Congress authorizing the President to suspend the privileges of the writ of *habeas corpus* was passed March 3, 1863, and Milligan was arrested by the military authorities in October, 1864, at the very height of the Civil War. He was a seditious and treasonable civilian plotting against the cause of the Union while the Civil War was flagrant and war conditions most critical. He lived in Indiana, which was within the military lines of the federal forces. The state had recently been invaded, and might be invaded again. The court, nevertheless, declared that any attempt by statute or otherwise to establish or apply martial law in Indiana at the time in question, namely, October, 1864, would be unconstitutional and void, because at the time and in the place it was sought to be enforced there was as matter of fact no actual military necessity or war emergency justifying or requiring the impairment of the constitutional rights of all citizens to due process of law and trial by jury. The court pointed out the co-equal obligation and uninterrupted existence and operation at all times of constitutional guaranties, and said (p. 120, 125-126):

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace,

and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority. . . .

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*. . . .

"The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed

> them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so."

And defining the circumstances under which the war power may temporarily supersede and override the constitutional rights and privileges of the individual, the ordinary courts and the states, the court added (p. 127):

> "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. . . . As necessity creates the rule, so it limits the duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power."

It should be noted that the qualifying opinion in the *Milligan* case (for there was no dissent from the decision itself), which represented the views of the minority of the court (Chief Justice Chase and Justices Wayne, Swayne and Miller), did not challenge the doctrine of the supremacy of the Constitution and the necessity for the existence of an actual war emergency, but maintained (at p. 140) that when the Nation was involved in war—

> "and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety."

A perusal of the opinion of Mr. Chief Justice Chase will show that it was not intended to assert on behalf of the minority of the court that during a state of technical war, as at present, after the army and navy of the United States had been actually demobilized and all danger of present invasion passed, Congress could suspend the writ of *habeas corpus* on the plea or pretext that the public safety so required, and will further show that there was no challenge of the power and duty of the court to determine as a justiciable question whether any emergency existed which would support the action of Congress. Speaking to this point the Chief Justice preceded the above quotation with the remarks:

> "We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.
>
> "Where peace exists the laws of peace must prevail."

Prof. Willoughby (Constitutional Law, vol. ii, p. 1251) has commented upon this decision as follows:

> "There would seem to be but little question but that the doctrine stated by the majority in the *Milligan* case is essentially a sound one, namely, that actual necessity and not constructive necessity, as determined by legislative declaration, alone will furnish justification for substituting martial for civil law."

The ruling and doctrine of the *Milligan* case have never been questioned by the court. With entire uniformity the authorities have laid down and applied the rule of actual necessity or emergency as the test of the authority of the Congress or the President to exercise any incidental war power in derogation of the constitutional rights of the citizen. *Mitchell* v. *Harmony*, 13

How. 115, 135; *Raymond* v. *Thomas*, 91 U. S. 712, 716; *Milligan* v. *Hovey*, 3 Biss. 13; *In re Egan*, 5 Blatchf. 319; *McLaughlin* v. *Green*, 50 Miss. 453; *Johnson* v. *Jones*, 44 Ill. 142, 154; *Griffin* v. *Wilcox*, 21 Ind. 370; *Nance & Mays* v. *Brown*, 71 W. Va. 519, 524; *United States* v. *Hicks*, 256 Fed. 707. The rule as to the President and military officers appointed by him was stated by Mr. Chief Justice Taney in *Mitchell* v. *Harmony, supra*, at p. 134, as follows:

> "It is the emergency that gives the right [to exercise war power in derogation of private right], and the emergency must be shown to exist before the taking [of private property] can be justified."

And in *Raymond* v. *Thomas, supra*, at p. 716, the court said:

> "It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires."

In the *Legal Tender Cases*, 12 Wall. 457, 540, the court declared:

> "This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect, or executing any of the known powers of Congress, or of any department of the government. Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. *It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times.*"

It is, therefore, submitted that only an actual war necessity "creates the rule," or "gives the right," or makes such means "consistent with the letter and spirit

of the Constitution"; in other words, that it is only actual war necessity or emergency that makes the taking of life, liberty, or property under the incidental war powers conformable to due process of law.

To argue that the war with Germany and Austria is not yet legally and formally terminated does not meet the point at all. The existence of actual war emergency and not mere *de jure* war is the controlling test of the right to deny the constitutional rights of citizens of the United States. That is clearly the doctrine of the *Milligan* case. The mere fact that a *de jure* state of war still exists would not warrant the subversion of state rights or constitutional immunities, if there be as matter of fact no actual war emergency. The controlling consideration lies not in the mere legal aspect of the continued existence of a technical state of war, but in the real and substantial existence and effect of an actual war necessity or emergency.

The cases which hold that, strictly and legally speaking, the war will not be terminated until a treaty of peace is ratified, mostly deal with such matters as the statute of limitations or the rights of aliens. Of course, an alien enemy ordinarily cannot sue until peace has been formally restored, and, therefore, the running of the statute is suspended in the meanwhile; but such precedents have no bearing upon the question here under discussion, which involves very different considerations, and affects quite different legal relations. Here citizens of the United States are invoking the protection of their constitutional rights, to which they are entitled "equally in war and peace," under a Constitution that "covers with

the shield of its protection all classes of men, at all times, and under all circumstances," as emphatically declared in the *Milligan* case.

IV.

CONGRESS IS NOT THE EXCLUSIVE JUDGE OF THE EXISTENCE OF WAR EMERGENCY WHEN EXERCISING INCIDENTAL WAR POWERS.

The contention of the Government seems to be, as indicated on the recent arguments before the District Court for the Southern District of New York, that the right of Congress to exert its war powers is absolute, that the question as to what particular measures are necessary is committed wholly to the discretion of Congress and that the judgment of Congress when expressed is not subject to review by the courts. It is submitted that this contention is clearly in conflict with the fundamental doctrine upon which this court has uniformly proceeded ever since the decision in *Marbury* v. *Madison*, 1 Cranch 137, and that it has long been settled that Congress is never the sole judge of the extent of its powers or of the existence of jurisdictional facts authorizing its action. It must be borne in mind that practically all the war powers of Congress, such as to raise and support armies and to provide and maintain a navy, exist and must be exercised in times of peace as well as war. These powers are expressly delegated and not limited to war times. But the incidental or implied powers are *expressly* limited to those "which shall be necessary and proper for carrying into execution" the delegated powers, and Congress is

never the sole judge of their appropriateness. The contention of the Government is fully refuted by the reasoning of Mr. Chief Justice Chase in *Hepburn* v. *Griswold*, 8 Wall. 603, 617, as follows:

> "It is said that this is not a question for the court deciding a cause, but for Congress exercising the power. But the decisive answer to this is that the admission of a legislative power to determine finally what powers have the described relation as means to the execution of other powers plainly granted, and, then, to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to have that relation, would completely change the nature of American government. It would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the executive and judicial from the legislative authority. It would obliterate every criterion which this court, speaking through the venerated Chief Justice in the case already cited, established for the determination of the question whether legislative acts are constitutional or unconstitutional.
>
> "Undoubtedly among means appropriate, plainly adapted, really calculated, the legislature has unrestricted choice. But there can be no implied power to use means not within the description."

The present contention on behalf of the Government is, in final analysis, that the assumption by Congress of a power to prohibit intoxicating and non-intoxicating beverages during a technical state of war is absolutely conclusive and precludes any inquiry by the courts as to the conditions actually existing when the acts in question were passed as alleged war measures, or when they are sought to be enforced against the individual. If sound, this view would vest in Congress as

well as in the President the broadest autocratic and despotic war powers, as soon as a technical state of war arose.

But it should be manifest that during the existence of a state of war neither Congress or the President becomes vested *ipso facto* with unlimited and despotic power throughout the United States, where no actual hostilities are being conducted, and that neither branch of the Government becomes the sole judge of the appropriateness of any means it may determine to be necessary and proper as a war measure. Otherwise, the moment a nominal or legal state of war arose, although without actual hostilities or very limited hostilities (as in the case of the war at sea with France in 1798 or with Tripoli in 1801), the Congress and the President would at once become vested with unlimited despotic powers to determine arbitrarily what means were necessary and proper, which would mean that during the existence of any period of war (and even as the Government suggested on the oral argument below during the period of all aftermaths of the war) Congress and the President in their several departments would be vested with such autocratic and despotic powers that the people of the United States would be quite at their mercy.

Fortunately, no such doctrine has ever been tolerated by this court. On the contrary, ever since the great case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, the assumption of power by Congress or the Executive has never been held to be conclusive. The controlling judicial inquiry always has been recognized to be whether the end in view is or is not legitimate at the time of the passage

and enforcement of an act of Congress; whether it is or is not an appropriate means to such a legitimate end, and whether it is or is not then plainly adapted to that end.

Furthermore, the constitutionality of any statute, whether criminal or not, must be determined as of the time and in the light of the circumstances existing when it is sought to be enforced against the individual. The time of actual incidence is always the test, since the effect upon the accused is alone the concern of the courts. "A law may be within the pale of constitutional authority when originally passed, yet because of its future operations it may directly contravene the organic law." *Castle* v. *Mason*, 91 Oh. St. 296, 303. The justiciable question always is whether or not a statute sought to be applied in a particular case against a person complaining or defending, does or does not violate the constitutional rights of that person at the time its terms and provisions are attempted to be enforced. The rate cases furnish a striking example and analogy. *Lincoln Gas & Electric Light Co.* v. *Lincoln*, 250 U. S. 256, 269; *Minnesota Rate Cases*, 230 U. S. 352, 473; *Missouri Rate Cases, ib.* 474, 508; *City of Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 18; *Wilcox* v. *Consolidated Gas Co., ib.* 19, 54; and particularly *Municipal Gas Co.* v. *Public Service Com.*, 225 N. Y. 89, 95, 97, where Cardozo, J., speaking for the unanimous court, said:

> "But the argument is that a statute is either valid or invalid at the moment of its making, and from that premise the conclusion is supposed to follow that there is a remedy for present confiscation, but none for confiscation that results from changed con-

ditions. We do not view so narrowly the great immunities of the Constitution, or our own power to enforce them. A statute prescribing rates is one of continuing operation. It is an attempt by the legislature to predict for future years the charges that will yield a fair return. The prediction must square with the facts, or be cast aside as worthless (*Ex parte Young*, 209 U. S. 123, 147, 148). It must square with them in one year as in another, at the beginning but equally at the end. In all such legislation, from the hour of its enactment, there thus inheres the seed of an infirmity which the future may develop. It is the infirmity that always waits upon prophecy; the coming years must tell whether the prophecy is true or false. All that we can say at the outset is that the power to regulate exists. The validity of its exercise depends upon the nicety of the adjustment between forecast and events. This is as true of a regulation which looks forward a year as of one which looks forward a decade or a century. In either case, with differences only of degree, there is a forecast of the future, which must be justified by results. Into every statute of this kind, we are to read, therefore, an implied condition. The condition is that the rates shall remain in force at such times and at such only as their enforcement will not work denial of the right to a fair return. When the return falls below that level, the regulation is suspended. When the level is again attained, the duty of obedience revives. There would be no obscurity about this if the condition were expressed. It is no less binding because it is implied. The Constitution is the supreme law; and statutes are written and enforced in submission to its commands."

This court itself has, in quite similar cases, recognized the principle now being urged: *e. g.*, in *Johnson* v. *Gearlds*, 234 U. S. 422, 446, and *Perrin* v. *United States*, 232 U. S. 478, 486. Both of these cases involved the power of Congress to prohibit the sale of intoxicating liquor in so-called Indian country within a state. In the

Perrin case the court defined the limitations upon the power of Congress thus to legislate as follows:

> "As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. Thus, a prohibition like that now before us, if covering an entire State when there were only a few Indian wards in a single county, undoubtedly would be condemned as arbitrary. And a prohibition valid in the beginning doubtless would become inoperative when in regular course the Indians affected were completely emancipated from Federal guardianship and control. A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the State. . . .
>
> "Of the claim that the prohibition is not expressly limited in its duration it is enough to observe that this objection cannot be of present avail. The conditions justifying the prohibition remain substantially the same as when it was adopted. The trust period has not expired, the tribal relation has not been dissolved, and the wardship of the Indians has not been terminated. *See Tiger* v. *Western Investment Co.*, 221 U. S. 286, 315; Act of May 8, 1906; 34 Stat. 182, c. 2348; *United States* v. *Pelican* (decided this day, *ante*, p. 442). The fact that the conditions may become so changed in the future as to render the prohibition inoperative affords no reason for condemning it now. Unless sooner repealed, it will continue in force as long as the presence and status of the Indians sustain it as a federal regulation."

And in *Johnson* v. *Gearlds*, the court reiterated the foregoing doctrine, and added:

> "We do not mean to say that if it appeared that no considerable number of Indians remained wards of the Government within the territory in question,

> the courts would not be justified in declaring that since the constitutional warrant for the restriction no longer existed the restriction must expire with it."

So, likewise, in the case at bar. Whatever may have been the situation at the time the act of November 21, 1918, was enacted or in the past, the present status of affairs must alone be consulted. The question before the court is, therefore, solely this: Is there *now* such actual war emergency or necessity in this country as would in any reasonable aspect warrant the enforcement of the new and extensive prohibitions contained in the act of October 28, 1919? The President has emphatically and unequivocally answered this inquiry in the negative in his messages to Congress of May 20th and October 27th. And Congress itself in the very act now before the court has recognized that the war is practically concluded by referring thereto in section 38 of title II as "the recent war."

In all the cases heretofore cited in support of war legislation, the legislation was warranted as of the date when it was operative and sought to be enforced. But none of them intimated that a person might be deprived of his liberty or property at some future date under the exercise of the war power, notwithstanding the fact that no actual war necessity for the sacrifice or denial of his constitutional rights might as matter of fact then exist.

The cases of *Northern Pacific Railway Company* v. *North Dakota*, 250 U. S. 135; *Dakota Central Telephone Company* v. *South Dakota*, *ibid.* 163; *Burleson* v. *Dempcy*, *ibid.* 191, and *MacLeod* v. *New England Telephone & Telegraph Co.*, *ibid.* 195, decided June 2, 1919,

in no way sustain the proposition that any implied declaration by Congress would be conclusive as to the existence of a present necessity justifying the prohibitions in question. What was decided in those cases was that, after the Government had taken possession and control of the railroads and telephones with due provision for just compensation and was operating them, they had become a governmental agency and as such were not subject to regulation by the states. The only war power asserted in those cases was that exercised by the President on December 16, 1917, in taking possession of the railroads, and on July 22, 1918, in taking possession of the telephone and telegraph systems. At both times the war was at its height, and the necessity for taking possession of these public utilities for the effective conduct of the war was imperative and indisputable. It was held that after the possession and control of the utilities had been duly taken by the Government, and that while they continued governmental agencies or instrumentalities, the states lost their right to regulate those agencies on well settled principles of law and policy, and not particularly because of any exercise of the war power. The agencies of the federal government cannot be subject to state regulation in war or peace alike, for that would necessarily subject the federal government to state control. The question in those cases would have been similar to that raised in the case at bar if, under the legislation then in question, the President were to attempt to take possession of the railroads and the telephones at the present time if no necessity for doing so concededly existed, and if he had himself officially declared that no such emergency or necessity existed.

The case of *Commercial Cable Co.* v. *Burleson*, 255 Fed. 99 (reversed by this court because rendered moot by the voluntary act of the defendants, 250 U. S. 360), did not involve a question analogous to that now under consideration, but arose rather under the exercise of the powers of eminent domain. The joint resolution there in question was passed on July 16, 1918, at the height of the war, and it expressly delegated to the President the power as Commander-in-chief of the army and navy to determine if and when an actual war emergency or necessity arose, and he so determined. The court was in effect asked to overrule the decision of the Commander-in-chief. An analogous question would be presented in the case at bar if title I of the National Prohibition Act had vested in the President the duty of ascertaining and determining the existence of a war emergency or necessity as a question of fact at the time the act was to be enforced, as did the joint resolution involved in the *Commercial Cable Company* case. And even then, if power had been so vested, it certainly could not be exercised arbitrarily. *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U. S. 88, 91; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

V.

Effect of the declaration by the President that the war emergencies which gave rise to the act of November 21, 1918, had been satisfied.

The justiciable question as to the existence or continuance of a war emergency presents, it is true, a very high

and delicate matter of public law and may as such involve grave difficulties of proof. In the absence of satisfactory evidence, the court might decline to hold that Congress had acted without authority in view of the continuance of a *de jure* state of war until a treaty of peace has been formally ratified. But the case at bar involves no such difficulty of proof because the President himself has in effect proclaimed in his veto message of October 27, 1919, and in other declarations that the war emergencies, which alone could uphold the prohibition legislation now in question, no longer exist.

In view of the war powers and responsibilities of the President and his express duty to inform Congress as to the state of the Union, it must be clear that it is especially fit and proper that he should determine officially as to the existence or continuance of a war emergency, and that, in the absence of other proof, his declarations as to this question of fact or actual date and condition should be deemed the best evidence and the most certain criteria. It involves a matter peculiarly within his knowledge and jurisdiction, and in such a matter the decision of the President, as Executive and Commander-in-chief, ought to be accepted as conclusive in the absence of any other proof or criteria.

If it be urged again by the Government that the question whether a war emergency exists or continues is in great measure a political question, to be conclusively determined by the political branch of the Government, surely it is none the less political and conclusive when it is decided by the President, and *a fortiori* so when there is no evidence either before Congress or the courts to the

contrary of, or in any way impeaching, his finding. In deed, as District Judge Hand declared in his opinion:

> "Title I of the National Prohibition Act wa passed over the veto of the President in which h said that demobilization was complete and that th other original purposes of the act were fulfilled. I would be preposterous to suppose that Congress re passed the act, because it disagreed with that state ment."

Some of the reasons for attributing the greatest weigh to the declarations of the President of the United State as to the actual state of the country, in war as well as i peace, are stated by Mr. Justice Story in his Commen taries, at sec. 1561, as follows:

> "The first part, relative to the President's givin information and recommending measures to Con gress, is so consonant with the structure of the ex ecutive departments of the colonial and State gov ernments, with the usage and practice of other fre governments, with the general convenience of Con gress, and with a due share of responsibility on th part of the executive, that it may well be presume to be above all real objection. From the nature an duties of the executive department, he must posses more extensive sources of information, as well i regard to the domestic as foreign affairs, than ca belong to Congress. The true workings of the laws the defects in the nature or arrangements of th general systems of trade, finance, and justice; an the military, naval, and civil establishments of th Union, are more readily seen, and more constantl under the view of the executive, than they can pos sibly be of any other department. There is grea wisdom, therefore, in not merely allowing, but i requiring the President to lay before Congress al facts and information which may assist their deliber ations; and in enabling him at once to point out th evil and to suggest the remedy. He is thus justl made responsible, not merely for a due administra

tion of the existing systems, but for due diligence and examination into the means of improving them."

In the leading case of *Martin* v. *Mott*, 12 Wheat. 19, there was presented for decision a very important question connected with the military powers of the United States, and, whilst it involved primarily the application of the act of Congress of February 28, 1795, c. 101, it evoked a discussion and reasoning equally applicable to the exercise of all the war powers vested in the President under the Constitution. The act of Congress of 1795 conferred upon the President authority to call forth the militia "to execute the laws of the Union, suppress insurrections, and repel invasions," and it was held that the authority to decide whether the exigencies contemplated in the Constitution and the act of Congress had arisen, was exclusively vested in the President and that his decision was conclusive. Mr. Justice Story delivered the unanimous opinion of the court. After discussing the nature of the power and the complications which would follow any other conclusion than that the authority of the President to decide whether the exigency had arisen was exclusive and his determination final, he declared, among other things, as follows:

"We are all of opinion that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is in-

dispensable to the complete attainment of the object. . . . . Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.

"The power itself is confided to the Executive of the Union, to him who is, by the constitution, 'the commander in chief of the militia, when called into the actual service of the United States,' whose duty it is to 'take care that the laws be faithfully executed,' and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the

Constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny."

In the famous case of *Luther* v. *Borden*, 7 How. 144, Mr. Chief Justice Taney discussed the powers of the President as follows:

"It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crises. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals."

In the *Prize Cases*, 2 Black 635, the court was called upon to consider and discuss the effect of President Lincoln's proclamations of April 19 and 27, 1861, establishing a blockade and declaring that a condition of public war existed, and it also considered to what extent these proclamations constituted official and conclusive evi-

dence that a state of war then existed. Delivering the opinion of the court, Mr. Justice Grier said, among other things (at p. 670):

> "Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. 'He must determine what degree of force the crisis demands.' The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure under the circumstances peculiar to the case."

The converse should be equally true; and if the President declares officially, as he did substantially in his veto message to Congress of October 27, 1919, that a war emergency no longer exists or continues, it should be deemed official and conclusive evidence of that fact.

In the case of *The Protector*, 12 Wall. 700, 702, the question presented was, when did the Civil War begin and end? Mr. Chief Justice Chase speaking for the court, said:

> "It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken. . . .
>
> "In the absence of more certain criteria, of equally general application, we must take the dates of these proclamations as ascertaining the commencement and the close of the war in the States mentioned in

them. Applying this rule to the case before us, we find that the war began in Alabama on the 19th of April, 1861, and ended on the 2d of April, 1866. More than five years, therefore, had elapsed from the close of the war till the 17th of May, 1871, when this appeal was brought. The motion to dismiss, therefore, must be granted."

It is, therefore, submitted that the President's declaration in his veto message to Congress of October 27, 1919, is conclusive proof that the war emergency which had authorized the enactment of the act of Congress of November 21, 1918, no longer existed or continued. No form of language could more definitely or plainly proclaim his view and his finding, and, unless it is to be held to be of no probative value at all, it ought to be conclusive in the absence of any other proof as to the state of the country when the act of October 28, 1919, was passed by Congress over his veto. For convenience of reference the veto message is printed in full in the appendix to this brief, and there is also printed a reference to the other declarations of the President and of the Executive Departments under his authority showing official declarations as to the practical conclusion of the war, the cessation of all hostilities and all war activities, and the complete demobilization of the army and navy.

It would, it is submitted, present a very strange anomaly if it were to be held that notwithstanding the solemn official declarations of the President, in respect of a matter peculiarly within his knowledge and jurisdiction, to the effect that a particular war emergency no longer existed calling for or justifying prohibition, the Congress could nevertheless disregard his findings and pro-

ceed to enact legislation based upon the assumption of a contrary state of facts.

VI.

THE CONDITION OF THE ACT OF CONGRESS OF NOVEMBER 21, 1918, HAS BEEN SATISFIED.

The language of the act of November 21, 1918, repeated in the act of October 28, 1919, clearly shows that it was the intention of Congress to vest in the President of the United States the power to determine when the war emergency contemplated in the act had terminated. The language used was: "until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States."

The term "until the conclusion of the present war" does not necessarily mean the ratification of the treaty of peace, because actual war may cease and be concluded long before any treaty of peace becomes effective. A foreign war may not be terminated for years in respect of many considerations arising under international law, and yet be concluded in respect of the rights and duties of citizens of the United States under the Federal Constitution; and it does not follow that because a technical state of war still prevails between the United States and Germany, the constitutional rights of the citizens of the United States or the reserved powers of the states can be denied under the war powers in the absence of any actual war emergency.

The meaning and intent of the act of Congress are, of course, to be sought and determined, primarily from the

subject matter to which it relates. Even if the original act of November 21, 1918, related, as it purports, to the actual prosecution of the war, the conservation of the man power of the Nation and the increase of efficiency in the production of arms, munitions, ships, food and clothing for the army and navy, no such relation can reasonably be claimed for its continuance a year later or for the act of October 28, 1919. The portion of the later act now in question deals solely with the enforcement of war prohibition; no other purpose appears to have been in mind. The cessation of hostilities following the signing of the armistice on November 11, 1918, the disarmament of Germany and Austria, the conclusion of the treaty of peace at Versailles on June 28, 1919, when it was signed by Germany and the American plenipotentiaries, the withdrawal of nearly all of the American army, the resumption of commercial and social relations with the enemy, the disbandment of war bureaus, and the complete demobilization of the army and navy, have, as the President has declared, fully satisfied the objects which were in the minds of Congress on November 21, 1918, and the war was thereupon concluded, so far as the subject matter of the act was concerned, notwithstanding that a technical state of war may still continue for months or years until a formal treaty of peace has been ratified. In other words, a technical state of war may exist until the formal treaty of peace, but actual war and actual war emergencies may wholly terminate by complete victory, the surrender and disarmament of the enemy, the demobilization of the armies, etc.

It cannot be doubted that, in ordinary and current lan-

guage, the war will always be referred to in the future as having been *concluded* when Germany submitted to the armistice on November 11, 1918, just as the pending treaty of peace will always be referred to, if ratified, as having been *concluded* at Versailles on June 28, 1919. A treaty of peace is always spoken of officially in this country as having been *concluded* on the day when the plenipotentiaries sign it, although it may not be ratified for several years afterwards. Reference to any official compilation of the treaties of the United States will show that this practice is almost invariable.

Moreover, Congress in the course of recent war legislation has itself recognized with deliberate discrimination the difference between the conclusion of the war and the final treaty of peace. Where it intends an act to continue in effect until the treaty of peace, it so declares in express and unmistakable terms and does not use such an ambiguous term as "conclusion of the present war," which wording is consistent with the meaning of termination or conclusion of actual war and war activities. Thus, in the Selective Service Law of June 15, 1917 (ch. 29, sec. 4, 40 Stat. 217), the language is "the conclusion of peace between the United States and its enemies in the present war," etc., and in the Trading with the Enemy Act of October 6, 1917 (ch. 106, sec. 2, 40 Stat. 412), there is an express provision to the effect that—

> "The words 'end of the war,' as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the 'end of the war' within the meaning of this Act."

In the Soldiers and Sailors Civil Relief Act of March 8, 1918 (ch. 20, sec. 100, subd. 5, 40 Stat. 441), the language is: "The term 'termination of the war' as used in this Act shall mean the termination of the present war by the treaty of peace as proclaimed by the President," and in the War Risk Insurance Act (ch. 145, sec. 9, 40 Stat. 898) the expression is: "The words 'end of the war' as used herein shall be deemed to mean the date of proclamation of exchange of ratification of the treaty of peace," etc. In several other war statutes the proclamation of the final treaty of peace is expressly mentioned as the condition upon which the respective acts are to cease and determine. See act of March 4, 1917, as amended by the act of July 1, 1918 (40 Stat. 720); acts of March 21, 1918 (40 Stat. 458), June 15, 1917 (40 Stat. 183), July 16, 1918 (40 Stat. 904), July 18, 1918 (40 Stat. 913) and the so-called Saulsbury Resolution of May 31, 1918 (40 Stat. 593). It must be manifest, therefore, that if the Congress had had in mind the treaty of peace as the event which would fix the conclusion of the war within the object and purpose of the act of November 21, 1918, it would have used the exact and definite language employed in other acts but that it did not do so because it contemplated rather the conclusion of actual hostilities and actual war emergency and activity, which would naturally thereafter be followed by demobilization, both of which would probably, according to past experience, precede the formal treaty of peace.

There is nothing unreasonable or far-fetched in attributing such an intention to Congress. It could not reasonably have contemplated that the treaty of peace

would be formulated within any short period of time, or, indeed, prior to the demobilization of the army or navy, in view of the many and complex problems involved. The state of actual war and hostilities was certain to end long before the promulgation of a final treaty of peace. It would be wasteful, improvident, and oppressive in the extreme to continue on a war basis long after all war emergency had ceased, and Congress, therefore, quite naturally used the term "conclusion of the present war" in the sense of the termination or cessation of actual hostilities to be followed thereafter by demobilization. The event has actually turned out as Congress presumably contemplated at the time. The cessation of hostilities and the prompt surrender and disarmament of Germany have been followed by demobilization and the resumption of commercial and social relations with the German people long before a treaty of peace. There may be no treaty of peace with Germany for several years. It is not, therefore, unreasonable to attribute to Congress an intention in regard to the term "conclusion of the present war" which would be consistent with due regard for the rights of the states and with the probable object in its mind and signify the conclusion of actual hostilities and of actual war activities. Such an interpretation would not only be inherently reasonable and logical, but would probably voice the actual intent of Congress, and would, moreover, avoid any question of constitutionality. Of course, "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt upon that score" (Holmes, J., in *United States* v. *Jin Fuey Moy*, 241 U. S.

394, 401). See also *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407.

Reference to the congressional debates tends to confirm these views. The Congressional Record shows that the rider to the Agricultural Appropriation Act of November 21, 1918, which is here under consideration, was added at the request of the so-called Anti-Saloon League, whose representatives wrote Senator Sheppard, the proponent of the measure, in part as follows (Cong. Rec., Aug. 29, 1918, p. 10,475):

> "We feel also that ample provision should be made for continuing the prohibition during the period of demobilization, which may be quite as important as during *actual hostilities.*"

The bill as originally drafted only provided: "until the conclusion of the present war." But in order to meet the views of the Anti-Saloon League Senator Sheppard added the provision concerning the period of demobilization, and then explained his reasons for so doing to Senator Wadsworth in the course of the following colloquy (*id.*, p. 10,489):

> "Mr. Sheppard: It was put in with a view to the probability that the war might end much sooner than we thought.
>
> "Mr. Wadsworth: Oh! Then this is something more than war prohibition.
>
> "Mr. Sheppard: No; I consider the period of demobilization a part of the war. It is the necessary aftermath of the war.
>
> "Mr. Wadsworth: The Senator has just said it was put in with the idea that the war might end a little sooner than was anticipated.
>
> "Mr. Sheppard: I meant by that the termination of actual hostilities."

The duration of the act of November 21, 1918, and title I of the act of October 28, 1919, as expressly provided therein, is "until the conclusion of the present war and thereafter until the termination of demobilization, *the date of which shall be determined and proclaimed by the President of the United States.*" The clause italicized can reasonably be construed to relate back, not only to the termination of demobilization, but to the conclusion of the war as well. It is "a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, [that] that expression is not limited to the last, but applies to all" (Lord Bramwell in *Great Western Ry. Co.* v. *Swindon & Cheltenham Ry .Co.*, L. R. 9 App. Cas. 787, 808). Indeed, this rule of interpretation is repeatedly illustrated in the statutes in suit themselves. Thus, for example, the act of November 21, 1918, provides a prohibition against "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes." Plainly the words "for beverage purposes" qualify the first words of the clause as well as the last; and many District Courts have ruled that the words "other intoxicating malt or vinous liquor" relate back to and qualify the preceding terms. It would then follow that the life of the legislation in question would run only until the President determined and proclaimed that the conditions thereof were satisfied. In the various messages and other formal pronouncements above referred to, the President has certainly determined and proclaimed that, for all the purposes of the wartime prohibition legislation, the war is concluded and demobilization termin-

ated. If the President had repeatedly used the expression that the war had "come to a conclusion" instead of the phrasing had "come to an end," no one would say that any different meaning was to be attributed to either form, for the substance would be the same. So likewise if the President had declared on October 27 that the army and navy were demobilized, instead of saying that the "objects of the legislation have been satisfied in the demobilization of the army and navy," the substance of both expressions would be identical.

Pursuing the analysis of the language of the act of November 21, 1918, repeated in the act of October 28, 1919, it will be noted that by the terms used the prohibition of the manufacture and sale of intoxicating liquors is to continue "until the conclusion of the present war and *thereafter* until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States." This language shows unmistakably that Congress meant by "the conclusion of the present war" some event that would happen prior to "the termination of demobilization." In the plainest terms it is declared that it is contemplated that necessarily demobilization will follow "the conclusion of the present war" in the sense in which that term is used in the act. Otherwise the word "thereafter" would be surplusage, and it is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. *Market Co.* v. *Hoffman*, 101 U. S. 112, 115. Only by deleting the word "thereafter" from the statute could the phrase "the conclusion of the present war" be given an interpretation which would

signify some event that should occur subsequent to the termination of demobilization. Such deletion of an important "time-word" in a clause specifying the time during which the prohibition is to be operative would offend not only the elementary rule of construction just stated, but also the further rule that the entire statute is to be considered in ascertaining the intent of the legislature. If one section of a statute must be construed with reference to the other sections with which it is associated, *a fortiori* one term or phrase must be construed with reference to the other terms or phrases with which it is associated in the same sentence. In such a case there is no room for any assumption that the legislature might have been for the moment unmindful of one phrase when it used the other. When in the same sentence the legislature says "until the conclusion of the present war *and thereafter* until the termination of demobilization," common sense forbids that they could have had in mind by "the conclusion of the present war" an event which would ordinarily and naturally be preceded by the termination of demobilization.

The construction that "the conclusion of the present war" may be an event which happens after the termination of demobilization can be reached only by striking out some words of the sentence and inserting others and thus remodelling the statute. It would be necessary to strike out the words "and thereafter" and insert in their place "or," and add or imply the phrase "whichever shall last occur." The radical character of such remodelling must be apparent. It must be manifest that such an alteration might make an entirely different statute from

that which the legislature intended to enact. It would introduce the necessity of choosing between several possible meanings of the phrase "the conclusion of the present war," when the statute as enacted indicates plainly that the phrase must be interpreted as meaning some event which must occur prior to demobilization and cannot occur thereafter. It requires the court to speculate as to what shall be satisfactory evidence of the date of "the conclusion of the present war," when the statute as enacted specifies that the court shall adopt as the date when the statute ceases to be operative, that determined by the President.

It is important to bear in mind that the occasion for interpreting the term is not an issue of international law concerning the rights of neutrals or of enemies or former enemies, but merely the necessity of discovering the intention of Congress in using one phrase in conjunction with another in the light of the constitutional rights of citizens and the reserved powers of the states. Where the question is only one of intention, the technical international law conceptions should not be resorted to in violation of all recognized canons of construction.

VII.

THE PRESIDENT HAS SUFFICIENTLY PROCLAIMED THE CONCLUSION OF THE WAR AND DEMOBILIZATION.

It was contended below in substance and effect by the learned United States Attorney that the acts of November 21, 1918, and October 28, 1919, contemplated and required a formal proclamation on the part of the President that demobilization had been completed, that

his veto message of October 27 was not a "proclamation," and that until there was a formal proclamation the acts of Congress in question must remain in full force and effect and enforcible as such. This contention, it is submitted, is plainly untenable. The President, of course, can "proclaim" a fact or finding in any manner that he sees fit: in order to proclaim he has only "to make known by public announcement." The President may "proclaim" a fact or event or finding in a veto message to Congress as fully as he may do so in any publication styled a proclamation and formally addressed to the public. If Congress had intended to require a formal "proclamation," it would have so expressly provided as in other familiar legislation, and would not have used the word "proclaimed" which is fully satisfied by any form of public announcement.

This contention of the Government, if accepted, would wholly disregard the spirit and substance of the provision and the object evidently in the mind of Congress, which was that the drastic prohibition throughout the United States and applicable to all classes of citizens, enacted in November, 1918, should not continue beyond the emergency created by the war and attendant demobilization. But even if Congress had intended and provided that the prohibitions should last indefinitely until the President saw fit to issue a formal proclamation, it could not thereby extend its war powers or make enforcible as against all citizens of the United States prohibition at a time when no war emergency existed or continued and months before the Eighteenth Amendment purported to become effective.

If the court should now rule that the President's declarations furnish evidence establishing the termination of the war emergencies which dictated or authorized the act of November 21, 1918, it would not thereby establish a precedent which would hereafter curtail or embarrass his powers under other war measures. Conceding *arguendo* that a war emergency may exist in respect of food or fuel until the treaty of peace or even afterwards during the period of necessary readjustment to a peace basis because incidentally if not inevitably attending the prosecution of war, it does not by any means follow that an emergency requiring or warranting the regulation of food or fuel would also require or warrant prohibition of intoxicating and non-intoxicating beverages. But to repeat, the subject matter of the act of October 28, 1919, is prohibition and not the conservation of food products.

The Food and Fuel Control Act of August 10, 1917, specially vests far-reaching war powers in the President, and he is empowered in his discretion to determine how far he shall avail of its provisions until (section 24) "the existing state of war between the United States and Germany shall have been terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President." The term "state of war," it will be noted, is different from the term "the conclusion of the present war and thereafter until the termination of demobilization." The President has not yet proclaimed that the war emergency in respect of food or fuel contemplated in and by the act of August 10, 1917, has been satisfied although he has expressly done so in respect of the emergency as to prohibition of intoxicants contem-

plated in and by the act of November 21, 1918. If he had declared that the emergencies in respect of food and fuel which called for the enactment of the act of August 10, 1917, had been actually satisfied and no longer existed, it is submitted that Congress would not then be authorized or warranted in reenacting the Food and Fuel Control Act based on the assumption that these war emergencies had nevertheless not been satisfied and still continued.

VIII.

THE ACT OF CONGRESS OF OCTOBER 28, 1919, IS NEW AND AFFIRMATIVE LEGISLATION, AND THE VALIDITY AND EFFECT THEREOF MUST THEREFORE BE DETERMINED AS OF THE DATE OF ITS PASSAGE.

The act of Congress of November 21, 1918, had been judicially interpreted by ten United States District Courts to include only actually *intoxicating* beer, wine, or other malt or vinous liquor. The new act, however, provides that—

> "The term 'War Prohibition Act' used in this Act shall mean the provisions of any Act or Acts prohibiting the sale and manufacture of intoxicating liquors until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States. The words 'beer, wine, or other intoxicating malt or vinous liquors' in the War Prohibition Act shall be *hereafter* construed to mean any such beverages which contain one-half of one per centum or more of alcohol by volume."

And it is conceded in this record that this would prohibit the manufacture and sale of non-intoxicating beverages.

It must be manifest that the latter definition is new legislation expressly limited to the future, and that its effect is to extend the scope of the prohibitions contained in the original act of Congress of November 21, 1918, so as to include non-intoxicating as well as intoxicating beers. It cannot, of course, operate to overthrow the decisions of the courts as to the true construction of the prior act, or apply to alleged offenses committed before the passage of the new act. To attempt to apply the statute of October 28, 1919, to acts done before its passage would obviously render its provisions violative of the constitutional guaranty against *ex post facto* laws. *Jaehne* v. *New York*, 128 U. S. 189.

The most objectionable form of amending and extending a statute is by providing that it shall be construed in a particular manner, because this tends often to mask or conceal the true effect of the legislation and the new provisions lurking in the definition. Discussing this question in his work on constitutional limitations, Judge Cooley, among other things, said (7th ed., p. 137):

> "As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. 'To declare what the law *is or has been* is a judicial power; to declare what the law *shall be*, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial.' If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial,

> but according to the legislative judgment. But in any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous, and suitable that could have been adopted."

But however this aspect may be viewed in connection with the statute now before the court, there can be no doubt that the power of Congress to declare the construction of an existing statute is to be determined as of the date of the passage of the construing act. In the present case that would be October 28, 1919. Therefore, the controlling question in the case at bar is whether on that date such a war condition or emergency existed as would constitutionally warrant the exercise of the war powers of Congress in derogation or destruction of the constitutional and property rights of the complainant and other brewers of the United States. As Mr. Justice Miller said in the case of *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 332:

> "It is undoubtedly true that, in our system of government, the law-making power is vested in Congress, and the power to construe laws in the course of their administration between citizens, in the courts. And it may be conceded that Congress cannot, under cover of giving a construction to an existing or an expired statute, invade private rights, with which it could not interfere by a new or affirmative statute."

To the prohibitions of the act of November 21, 1918, additional prohibitions are established by the act of October 28, 1919, which expressly and necessarily operate

only as to the future. The new act declares that only "*hereafter*" shall the new test be, not the actual intoxicating quality of the beverage, but an arbitrarily prescribed alcoholic content, and if the beverage contain as much as one-half of one per cent. of alcohol it is hereafter to fall under the ban. The insertion of the word "hereafter" clearly discloses the intention that the act of October 28, 1919, should establish a new and different rule for the future, and thus what has heretofore been wholly lawful is "hereafter" to be a crime. Harmless beverages which were freely and legally manufactured and sold while the war as at its height and while the act of November 21, 1918, was alone in effect, are now declared to be prohibited and their value as property to be destroyed, and that too as a war measure!

Congress has not only denounced certain acts as criminal which were not unlawful heretofore, but, in addition, has provided new and most drastic punishments for the new offenses created. The National Prohibition Act of October 28, 1919, in section 3 of title I provides, for example, that—

> "Any room, house, building, boat, vehicle, structure, or place of any kind where intoxicating liquor is sold, manufactured, kept for sale, or bartered in violation of the War Prohibition Act, and all intoxicating liquor and all property kept and used in maintaining such a place, is hereby declared to be a public and common nuisance, and any person who maintains or assists in maintaining such public and common nuisance shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than $100 nor more than $1,000, or be imprisoned for not less than thirty days or more than one year, or both. If a person has knowledge that his property

is occupied or used in violation of the provisions of the War Prohibition Act and suffers the same to be so used, such property shall be subject to a lien for and may be sold to pay all fines and costs assessed against the occupant of such building or property for any violation of the War Prohibition Act occurring after the passage hereof, which said lien shall attach from the time of the filing of notice of the commencement of the suit in the office where the records of the transfer of real estate are kept; and any such lien may be established and enforced by legal action instituted for that purpose in any court having jurisdiction. Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease."

Title I of the National Prohibition Act, purporting to provide for the enforcement of war prohibition, is, therefore, plainly in its necessary and practical effect new legislation, extending the scope of the prior prohibitions and creating new crimes and punishments, entirely unsanctioned until its passage. It does not merely perfect or enforce an existing law in a minor and secondary manner, but extends into and takes unto itself an entirely new field of operation, namely, the manufacture or sale of non-intoxicating beer and other beverages, and visits upon those engaged in any such business new and inherently different criminal penalties.

IX.

As to the effect of Eighteenth Amendment.

The language of the Eighteenth Amendment presents a very grave question as to the legislative power of Congress to enact prohibition legislation effective before

the expiration of one year from the ratification of that Amendment. The Amendment is, of course, an integral part of the Constitution, and it contains the only provision that in any way deals with the subject and power of prohibition of intoxicating beverages. Its implications are, of course, as much a part of the Amendment and as binding as its language.

It will be recalled that the Amendment was proposed by Congress to the several states on December 3, 1917, at the very height of the great war, and was ratified by many states during the course of the war. It was declared ratified as of January 16, 1919. It provides in section 1 as follows:

> "*After one year from the ratification of this article* the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into or exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

Congress and the people of the United States, who thus proposed and adopted this amendment to the Constitution in war time, clearly intended that the power to prohibit intoxicating liquors should not be exercised by Congress until the expiration of one year from ratification. They appreciated that the amendment meant the destruction of large industries worth hundreds of millions of dollars without any compensation at all and the means of livelihood of thousands of persons, as well as the withdrawal from the states of a source of large revenue. Accordingly, they decreed by express constitutional provision that there should be one year of grace in order to serve practically in lieu of compensation, and to give those engaged

in the industries affected a fair and reasonable opportunity to wind up their businesses, adjust and liquidate their affairs, and find new occupations with a minimum of hardship and social dislocation, and to enable states and municipalities to accommodate and readjust their fiscal systems to the new order. In other words, the people in and by the Eighteenth Amendment impliedly declared as their sovereign will at a time of war that there should be no federal prohibition until the expiration of one year from the final ratification of the amendment.

As is well known, it was the declared purpose and intent of the Judiciary Committee of the House of Representatives, which drafted and proposed the Eighteenth Amendment, to grant to the brewers of the United States and others affected at least one year after the ratification of the proposed amendment in order to enable them to wind up and liquidate their businesses, which were about to be destroyed without any compensation whatever, and this reasonable, fair and just condition undoubtedly promoted and secured prompt ratification of the amendment by the states. At the time the proposed amendment was submitted to the House of Representatives on December 17, 1917, the following statement was made to the House by the Chairman of the Judiciary Committee, on behalf of the framers of the proposed amendment (Cong. Rec., Dec. 17, 1917, p. 432):

> "The idea of giving the brewers and distillers one year after ratification to wind up their business struck the dry members of the committee as being fair and just. We realize that the brewing business and the distilling business are legitimate at present in a number of States. It is legitimate to run bar

rooms, and while we prohibitionists desire to have the country go dry, we do not propose to let our zeal in that great cause destroy our sense of justice, and I for one was willing to advocate the right of the brewers and distillers to have one year to wind up their business. We have distinguished precedents for this in the action of nearly all the dry States. Most of the States give them a year in which they may wind up their business. We saw no objection to giving them at least a year after this business is outlawed to wind up their affairs. I wanted to explain it to the House. I think it is a perfectly fair amendment, and I will be very glad to vote for it, and I hope the dry members will vote for it."

To repeat: the year of grace contained in the amendment was proposed by Congress and acted upon by the states whilst the war was at its height; and there was no suggestion that the year of delay thus expressly provided for could possibly be dispensed with under the incidental war powers of Congress, and certainly not unless some new overriding emergency arose. Had any one then conceived that war necessity or emergency, a subject then preeminently in the minds of everyone, might render it advisable to deny to the brewers and others the benefit of the year of delay, a limitation or reservation would certainly have been expressed. In interpreting the language of this Amendment to the Constitution adopted during the course of a war, it is always well to bear in mind the words of Mr. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 188:

> "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

So, too, in respect of the words now before the court, it must be presumed that they were embodied in the Amendment advisedly while war was waging, and that they express the intent of the people that, notwithstanding the pending war and under the then existing conditions, the prohibition should not be operative for the period of one year after ratification of the Amendment. That expressly declared intent would be nullified if Congress under any implied incidental power could meantime prohibit under any excuse and thereby overrule the declared wish of the people.

It is, however, now proposed in and by the act of October 28, 1919, to defeat this plainly expressed intent of the Eighteenth Amendment. Even if the war were still active and flagrant, the provision of the Eighteenth Amendment, adopted during war times, should limit and qualify any implied war power in derogation thereof, and certainly so as to emergencies which existed when the amendment was proposed and adopted. No implied war power to ban both intoxicants and non-intoxicants should be held to exist at the present time in the very face of the fact that the constitutional amendment itself expressly deferred the prohibition for one year and impliedly guaranteed to all those engaged in the business of manufacturing and selling intoxicating liquors that they should meanwhile remain unmolested, so far as the exercise of federal power of prohibition was concerned, until the expiration of one year from the date of ratification. It is in effect proposed to add to the amendment a proviso authorizing Congress to deny any time of grace if deemed necessary and proper as a war measure!

It does not follow that the Government would have been disabled from meeting new emergencies of war if they had arisen after the ratification of this amendment. Congress could always authorize condemnation of whatever food products or other property might be needed for war purposes, or ration the food of the country, or, in the exercise of its powers to make rules for the army and navy, forbid liquor to be sold to soldiers and sailors, etc. Only general federal prohibition was impliedly forbidden during the year of grace.

Reasoning in support of this aspect of the question is lucidly stated in the opinion of District Judge Brown of the District of Rhode Island filed in the case of the *Narragansett Brewing Company*, which is printed in full in the appendix to this brief.

X.

CONGRESS MAY NOT BAN NON-INTOXICANTS UNDER THE WAR POWER.

In the case at bar there is the further point that, even if Congress in the exercise of its war powers could prohibit the manufacture and sale of intoxicating liquors, it could not prohibit the manufacture and sale of beverages which are indisputably and concededly non-intoxicating. Any such stretch of legislation, if upheld as incidental to any incidental war power of Congress to prohibit intoxicating liquors, would carry the incidental power of Congress beyond anything yet approved or permitted by this court. The reasoning which is advanced to uphold this extension of power under the National

Prohibition Act of October 28, 1919, would practically overthrow the doctrine of *Hammer* v. *Dagenhart*, 247 U. S. 251, 273, 276, and analogous cases, denying to Congress any such general police power in aid of its express powers.

The case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, relied on by the Government as in point for the contention that Congress may prohibit the manufacture and sale of non-intoxicating beverages, presented for consideration solely the police powers of the states in so far as they were limited by the Fourteenth Amendment. The national government has no police power and may not, therefore, enact laws prohibiting the manufacture and sale of intoxicants simply because Congress deems that course advisable for the public welfare. The *Purity Extract Co.* case, moreover, prohibited all malt liquors, whether intoxicating or not, because malt beverages might be used to conceal intoxicating malt liquors. No such object can be attributed to the act of Congress of October 28, 1919, because it does not prohibit all malt liquors, but divides them by an arbitrary standard of percentage of alcohol.

It does not follow, however, that because Congress may exercise the power of prohibiting intoxicants in war time, it can go further and ban non-intoxicants as an incident to this implied incidental power. The Constitution merely confers upon Congress the right to exercise powers incidental to enumerated powers if necessary and proper, not the right to exercise powers incidental to implied incidental powers. Any other theory would strip the states of all their powers for, if each

implied incidental power breeds new powers by added implication, there is no point at which the process can be halted, but the result must in time be one consolidated government in place of our present federal system. The fallacy of such a doctrine was early exposed by Jefferson in a letter to Livingston in which we wrote (Ford's Jefferson, vol. VII, p. 44):

> "The House of Representatives sent us a bill for incorporating Roosevelt's copper mines in New Jersey. I do not know whether it is understood that the legislature of New Jersey was incompetent to do this, or merely that we have concurrent legislation under the sweeping clause. Congress are authorized to defend the nation; ships are necessary for defence; copper is necessary for ships; mines are necessary for copper; a company necessary to work mines; and who can doubt this reasoning who has ever played at 'This is the House that Jack Built!' Under such a process of filiation of necessities the sweeping clause [of the constitution] makes clean work."

See, also, *McCulloch* v. *Maryland*, 4 Wheat. 316, 411; 3 Hamilton's Works (Lodge's ed.), p. 192; 1 Congressional Debates, p. 1899 (Madison, Feb. 1791); 22 Annals of Congress, p. 212 (Clay, Feb. 1811); Rept. No. 1143, House of Rep., Feb. 26, 1919, pp. 7, 9. As Madison declared:

> "If implications thus remote and thus multiplied can be linked together a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy."

XI.

THE OPPRESSIVE CHARACTER OF THE ACT OF CONGRESS O OCTOBER 28, 1919, IN RESPECT OF EXISTING STORES OF NO INTOXICATING BEER.

The act of Congress of October 28, 1919, is particularl unjust and oppressive in respect of the brewers of th United States. These brewers were engaged in manu facturing and selling a beverage which is non-intoxica ing, which was expressly authorized by the President i his proclamation of December 8, 1917, in force during large part of the war period, and which was prohibite by him only in his proclamation of September 16, 191 when the conservation of all the food products of th country became necessary. Millions of dollars worth o non-intoxicating beer have been manufactured in goo faith in reliance upon the proclamations of the Presiden of January 30 and March 4, 1919, and the value of all thi product will in large measure be destroyed by the opera tion of the act of October 28, 1919, if it be constitutiona without any compensation whatever, on the theory tha this sacrifice of the property of a particular class at thi time is necessary and proper for carrying into executio the war powers of the Nation!

As to the non-intoxicating beer on hand on October 2 1919, which was manufactured under authority of th President's Proclamations of December 8, 1917, an January 30 and March 4, 1919, it is submitted that it sale could not be prohibited and its commercial value de stroyed without the just compensation guaranteed to al by the Fifth Amendment.

As this aspect of the act of November 21, 1918, will be particularly presented in the brief for the appellee in the case of the Kentucky Distilleries & Warehouse Company, no more need be said than to refer to the case of *Wynehamer* v. *The People*, 13 N. Y. (3 Kernan) 378, where the subject was exhaustively discussed. This question of constitutional law has never been decided by this court, although argued several times, because it was found in each case that the point was not actually involved and presented for decision. *Bartemeyer* v. *Iowa*, 18 Wall. 129, 133; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32; *Eberle* v. *Michigan*, 232 U. S. 700, 706; *Barbour* v. *Georgia*, 249 U. S. 454, 460.

In the *Bartemeyer* case, however, Mr. Justice Miller (at p. 134) declared that this question was "of an importance to require the most careful and serious consideration" and was "not to be lightly treated," in which view Mr. Justice Bradley evidently concurred by saying that "when vested rights stand in the way of the public good they can be removed by awarding compensation to the owner." And in the *Beer Co.* case, Mr. Justice Bradley said at p. 32:

> "We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation."

It is submitted that the question is not foreclosed by the decision in *Mugler* v. *Kansas*, 123 U. S. 623, which only involved the incidental depreciation and damage resulting from a prohibition operating in the future so as only to prevent a particular use of a manufacturing plant. It did not even remotely involve the question whether the

sale of such a plant could be prohibited or the value of beverages actually on hand could be destroyed by prohibition without just compensation.

XII.

Opinion of the court below on dismissing bill.

The reasoning of District Judge Learned Hand in the court below, would, if sound, extend the constitutional powers of Congress so as completely to override the reserved powers of the states, not only in time of war and its aftermath, but in time of peace. If the mere fact that the Federal Government is now employing hundreds of thousands of men upon the railways of the country would in and of itself support prohibition legislation "because its employees permeate every corner of the land and mingle freely and indistinguishably with all citizens," then almost all the police power of the states could at any time be subordinated to the federal power on the plea that the morals and welfare of innumerable federal functionaries were involved. There are now federal employees everywhere, and their number will inevitably increase. Congress would then be the sole judge of what police measures were or were not necessary and proper to promote benevolently the morals and welfare of the Government's employees throughout the country and incidentally of the remaining population.

The learned District Judge misapprehended the argument of the complainant. It was not urged that the President had any dispensing or suspending power, or could decline to enforce a valid act of Congress or ab-

solve citizens from a rule laid down by Congress, because, in his judgment, it was no longer necessary. It is, of course, at all times the duty of the President to "take care that the laws be faithfully executed," and he would disregard that duty at the peril of impeachment.

It is said in the opinion that it is not "the practice of any democratic country that the executive should have such powers," but it should be borne in mind that in other democratic countries the executive department is but a committee of the legislative branch, and if any radical difference of opinion exist, a new executive is created to represent the legislative department. Hence, the powers of the executive branch of the government, *e. g.*, in England or France or Italy or Belgium, are not at all analogous to the independent powers of the President of the United States.

The point which was urged and relied on by the complaint was that when it becomes the duty of the courts to determine whether or not a war emergency existed which authorized prohibition legislation by Congress as a means to some legitimate end, the declaration of the President furnished competent, and it might be conclusive, evidence of the actual non-existence of such an emergency as a matter of fact. The action of Congress is, of course, not to be lightly set aside; the means must ordinarily be within its choice if the end in view be legitimate, and, in the absence of proof, every reasonable presumption should be indulged in support of its assumption and exercise of power. But where there is competent evidence, as in the declarations of the President or other facts of public knowledge (as in the *Milli-*

gan case), establishing that a war emergency no longer continues, then that evidence should be accepted and acted upon by the courts.

There is no dispute as to the effect and meaning of the President's declaration, nor as to its correctness. Judge Hand himself declares that—

> "Title I of the National Prohibition Act was passed over the veto of the President in which he said that demobilization was complete and that the other original purposes of the act were fulfilled. It would be preposterous to suppose that Congress repassed the act because it disagreed with that statement. The only possible explanation is that it had other purposes in mind, as indeed the plaintiffs stoutly assert."

Now, if this be so, if a court properly and solemnly declares that it would be preposterous to suppose that Congress disagreed with the President's statement of a fact, then the courts may certainly declare it to be duly proved that no war emergency now exists which warrants the enforcement of the legislation in question because it seeks to promote an end not now within the federal power but within that of the several states.

As to the suggestion of District Judge Hand that the people must submit to this war legislation because the President has not formally *proclaimed* demobilization, the complete answer should surely be that such failure is quite beside the question of the constitutional power of Congress to enact that such a law shall be now enforcible. A provision that there should be a proclamation in any particular form would be as invalid as the prohibition itself if no war emergency whatever justified or warranted the enforcement of the legislation. But

it would clearly be disregarding the spirit and substance of the provision of the act of November 21, 1918, to say that the President must "proclaim" his determination in some particular form not indicated in the statute. As above argued, the President may *proclaim* a fact or condition in any public message, and he has impressively *proclaimed* the fact of actual demobilizatin of the army and navy in his veto message to Congress.

XIII.

THE JURISDICTION OF A COURT OF EQUITY TO ENJOIN THE DEFENDANTS.

The decisions of this court have settled the rule that, in cases challenging the constitutionality of a statute whether passed by Congress or a state legislature, equity has jurisdiction to restrain defendant officers who are charged by the law with its enforcement, where it appears that irreparable injury to business and property of a complainant is reasonably to be apprehended, even though some of the acts sought to be restrained are anticipated criminal proceedings. Jurisdiction over controversies similar to that now presented has been frequently sustained by this court. *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 241; *Ex parte Young*, 209 U. S. 123, 155; *Western Union Tel. Co.* v. *Andrews*, 216 U. S. 165, 166; *Herndon* v. *C., R. I. & P. Ry.*, 218 U. S. 135, 155; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619; *Truax* v. *Raich*, 239 U. S. 33, 37; *Wilson* v. *New*, 243 U. S. 332; *Hammer* v. *Dagenhart*, 247 U. S. 251. See also *Municipal Gas Co.* v. *Public Service Com.*, 225 N. Y. 89, 101.

CONCLUSION

For the reason discussed above, it is submitted that the act of Congress of October 28, 1919, is unconstitutional as beyond the power of the Federal Government to enforce at the present time in view of the cessation of the war emergency which dictated the act of November 21, 1918, and that if the latter act prohibits the manufacture and sale of non-intoxicating beverages, then it is no longer enforcible because the particular war emergency upon which it was based, has ceased to exist. The decree of the court below should, therefore, be reversed and the preliminary injunction granted.

New York, November 18, 1919.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
WILLIAM L. MARBURY,
Of counsel for appellant Ruppert Co.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

JACOB RUPPERT, a corporation,
Appellant,

against

FRANCIS G. CAFFEY, United States Attorney, etc., and RICHARD J. MCELLIGOTT, Acting and Deputy Collector of Internal Revenue, etc.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX TO APPELLANT'S BRIEF.

COMPILATION

ACTS OF CONGRESS, PRESIDENTIAL PROCLAMATIONS, ETC.

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COMPILATION.

I.

Acts of Congress

Act of Congress Approved August 10, 1917, commonly known as the Lever Food and Fuel Control Act.

40 Stat. 276, ch. 53.

An Act To provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, fuel including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes the instrumentalities, means,

methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act. . . .

Sec. 2. . . . In carrying out the purposes of this Act, the President is authorized to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, to accept the services of any person without compensation, to cooperate with any agency or person, to utilize any department or agency of the Government, and to co-ordinate their activities so as to avoid any preventable loss or duplication of effort or funds. . . . .

Sec. 15. That from and after thirty days from the date of the approval of this Act no foods, fruits, food materials, or feeds shall be used in the production of distilled spirits for beverage purposes: *Provided*, That under such rules, regulations, and bonds as the President may prescribe, such materials may be used in the production of distilled spirits exclusively for other than beverage purposes, or for the fortification of pure sweet wines as defined by the Act entitled "An Act to increase the revenue, and for other purposes," approved September eighth, nineteen hundred and sixteen. Nor shall there be imported into the United States any distilled spirits. Whenever the President shall find that limitation, regulation, or prohibition of the use of foods, fruits, food materials, or feeds in the production of malt or vinous liquors for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquor, is essential, in order to assure

an adequate and continuous supply of food, or that the national security and defense will be subserved thereby, he is authorized, from time to time, to prescribe and give public notice of the extent of the limitation, regulation, prohibition, or reduction so necessitated. Whenever such notice shall have been given and shall remain unrevoked no person shall, after a reasonable time prescribed in such notice, use any foods, fruits, food materials, or feeds in the production of malt or vinous liquors, or import any such liquors except under license issued by the President and in compliance with rules and regulations determined by him governing the production and importation of such liquors and the alcoholic content thereof. Any person who willfully violates the provisions of this section, or who shall use any foods, fruits, food materials, or feeds in the production of malt or vinous liquors, or who shall import any such liquors, without first obtaining a license so to do when a license is required under this section, or who shall violate any rule or regulation made under this section, shall be punished by a fine not exceeding $5,000, or by imprisonment for not more than two years, or both: *Provided further*, That nothing in this section shall be construed to authorize the licensing of the manufacture of vinous or malt liquors in any State, Territory, or the District of Columbia, or any civil subdivision thereof, where the manufacture of such vinous or malt liquor is prohibited. . . .

Sec. 17. That every person who willfully assaults, resists, impedes, or interferes with any officer, employee, or agent of the United States in the execution of any duty authorized to be performed by or pursuant to this Act shall upon con-

viction thereof be fined not exceeding $1,000 or be imprisoned for not more than one year, or both. . . .

Sec. 22. That if any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered.

Sec. 23. That words used in this Act shall be construed to import the plural or the singular, as the case demands. The word "person," wherever used in this Act, shall include individuals, partnerships, associations, and corporations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any official, agent, or other person acting for or employed by any partnership, association, or corporation within the scope of his employment or office shall, in every case, also be deemed the act, omission, or failure of such partnership, association, or corporation as well as that of the person.

Sec. 24. That the provisions of this Act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President; but the termination of this Act shall not affect any act done, or any right or obligation accruing or accrued, or any suit or proceeding had or commenced in any civil case before the said termination pursuant to this Act; but all rights and liabilities under this Act arising before

its termination shall continue and may be enforced in the same manner as if the Act had not terminated. Any offense committed and all penalties, forfeitures, or liabilities incurred prior to such termination may be prosecuted or punished in the same manner and with the same effect as if this Act had not been terminated. . . .

Act of Congress approved November 21, 1918, known as the War Prohibition Act.

40 Stat. 1045, ch. 212.

An Act To enable the Secretary of Agriculture to carry out during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [Sec. 1] That to enable the Secretary of Agriculture to carry out, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," approved August tenth, nineteen hundred and seventeen (Fortieth Statutes, page two hundred and seventy-three), there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the following sums for the purposes indicated: *Provided,* That no part of the money hereby appropriated shall be used in paying salary or expenses of any man who on account of employment in which he is or may be engaged under the provisions of this Act has been or shall hereafter be certified by the Secretary of Agriculture, or by any other official of the Department of Agriculture, for deferred classification, or by action of any other Federal official or authority has been or may hereafter be placed in a deferred class under Act numbered twelve, Sixty-fifth Congress, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and

seventeen, or under any Act amendatory thereof that has been or shall hereafter be enacted: . . .

Fourth. For increasing food production and eliminating waste and promoting conservation of food, including eatable nuts, by educational and demonstrational methods, through county, district, and urban agents and others; for the following stated purposes and in amounts as follows: General administration of extension work, $35,000; Home-economics work, $25,000; extension work in the Northern and Western States, $134,200; county-agent work, $1,893,000; boys' and girls' club work, $382,900; home-demonstration work, $1,327,400; extension work in the Southern States, $90,000; county-agent work, $1,333,815; boys' club work, $75,300; home-demonstration work, $803,385; in all, $6,100,000.

That after June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxi-

cating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June thirtieth, nineteen hundred and nineteen, until this Act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale, and distribution of wine for sacramental, medicinal, or other than beverage uses. After the approval of this Act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization: *Provided,* That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this Act.

Any person who violates any of the foregoing provisions shall be punished by imprisonment not exceeding one year, or by fine not exceeding $1,000, or by both such imprisonment and fine: *Provided,* That the President of the United States be, and hereby is, authorized and empowered, at any time after the passage of this Act, to establish zones of such size as he may deem advisable about coal mines, munition factories, shipbuilding plants, and such other plants for war material

as may seem to him to require such action whenever in his opinion the creation of such zones is necessary to, or advisable in, the proper prosecution of the war, and that he is hereby authorized and empowered to prohibit the sale, manufacture, or distribution of intoxicating liquors in such zones, and that any violation of the President's regulations in this regard shall be punished by imprisonment for not more than one year, or by fine of not more than $1,000, or by both such fine and imprisonment: *Provided further,* That nothing in this Act shall be construed to interfere with the power conferred upon the President by section fifteen of the food-control Act, approved August tenth, nineteen hundred and seventeen (Public Numbered Forty, Sixty-fifth Congress). . . . Approved November 21, 1918.

ACT OF CONGRESS PASSED OVER PRESIDENT'S VETO OCTOBER 28, 1919, KNOWN AS THE NATIONAL PROHIBITION ACT.

An Act To prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the short title of this Act shall be the "National Prohibition Act."

TITLE I.

TO PROVIDE FOR THE ENFORCEMENT OF WAR PROHIBITION.

The term "War Prohibition Act" used in this Act shall mean the provisions of any Act or Acts

prohibiting the sale and manufacture of intoxicating liquors until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States. The words "beer, wine, or other intoxicating malt or vinous liquors" in the War Prohibition Act shall be hereafter construed to mean any such beverage which contain one-half of 1 per centum or more of alcohol by volume: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of Title II of this Act, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe.

Title III.

Sec. 21. Titles I and III and sections 1, 37, and 38 of title II of this Act shall take effect and be in force from and after the passage and approval of the Act. The other sections of title II shall take effect and be in force from and after the date when the eighteenth amendment of the Constitution of the United States goes into effect.

Federal Control of Carriers Act.

40 Stat. 451, ch. 25.

An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes. [March 21, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.

That any railroad operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States. In the computation of such income, debits and credits arising from the accounts called in the monthly reports to the Interstate Commerce Commission equipment rents and joint facility rents shall be included, but debits and credits arising from the operation of such street electric passenger railways, including rail-

ways commonly called interurbans, as are at the time of the agreement not under Federal control, shall be excluded. If any lines were acquired by, leased to, or consolidated with such railroad or system between July first, nineteen hundred and fourteen, and December thirty-first, nineteen hundred and seventeen, both inclusive, and separate operating returns to the Interstate Commerce Commission were not made for such lines after such acquisition, lease, or consolidation, there shall (before the average is computed) be added to the total railway operating income of such railroad or system for the three years ended June thirtieth, nineteen hundred and seventeen, the total railway operating income of the lines so acquired, leased, or consolidated, for the period beginning July first, nineteen hundred and fourteen, and ending on the date of such acquisition, lease, or consolidation, or on December thirty-first, nineteen hundred and seventeen, whichever is the earlier. The average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.

Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed un-

der Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation.

Every such agreement shall also contain adequate and appropriate provisions for the maintenance, repair, renewals, and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments of charges and payments, both during and at the end of Federal control as may be requisite in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control, and also that the United States may, by deductions from the just compensations or by other proper means and charges, be reimbursed for the cost of any additions, repairs, renewals, and betterments to such property not justly chargeable to the United

States; in making such accounting and adjustments, due consideration shall be given to the amounts expended or reserved by each carrier for maintenance, repairs, renewals, and depreciation during the three years ended June thirtieth, nineteen hundred and seventeen, to the condition of the property at the beginning and at the end of Federal control and to any other pertinent facts and circumstances.

The President is further authorized in such agreement to make all other reasonable provisions, not inconsistent with the provisions of this Act or of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, that he may deem necessary or proper for such Federal control or for the determination of the mutual rights and obligations of the parties to the agreement arising from or out of such Federal control.

If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years ended June thirtieth, nineteen hundred and seventeen, because of non-operation, receivership, or where recent expenditures for additions or improvements or equipment were not fully reflected in the operating railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount

as just compensation as under the circumstanes of the particular case he shall find just.

That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: Provided, however, That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both.

The agreement shall also provide that the carrier shall accept all the terms and conditions of this Act and any regulation or order made by or through the President under authority of this Act or of that portion of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation.

Sec. 14. . . . . shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proc-

lamation by the President of the exchange of ratifications of the treaty of peace;

Sec. 16. That this Act is expressly declared to be emergency legislation enacted to meet conditions growing out of war; and nothing herein is to be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of carriers or the method or basis of the capitalization thereof.

Control of Communications Act.

40 Stat. 904, ch. 154.

Joint Resolution to authorize the President, in time of war, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof and to operate the same in such manner as may be needful or desirable for the duration of the war, and to provide just compensation therefor. [July 16, 1918.]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which super-

vision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided, That just compensation shall be made for such supervision, possession, control, or operation to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code: Provided further, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems.

II.

Proclamations, messages and other statements of the President.

Proclamation and executive order of September 2, 1917, directing the Treasury Department to supervise, direct, and carry into effect the provisions of Sections 15 and 16 of the Act of August 10, 1917, viz.:

> "Acting under the authority of section 2 of the Act of Congress approved August 10, 1917, entitled 'An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' which section reads in part, as follows: 'That in carrying out the purposes of this Act the President is authorized . . . to utilize any department or agency of the Government, and to coordinate their activities so as to avoid any preventable loss or duplication of efforts or funds;' because the office of the Commissioner of Internal Revenue in the Treasury Department is now regulating the production of distilled spirits through the United States and is in control of the machinery necessary to enforce effectively the provisions of sections 15 and 16 of the aforesaid act of August 10, 1917, relating to distilled spirits:
>
> "Now, in order more effectively to enforce the provisions of said act, and to avoid preventable duplication of effort and funds, I hereby direct that the Treasury Department shall henceforth supervise, direct, and carry into effect the provisions of sections 15 and

16 of said act of August 10, 1917, and exercise the powers and authority therein given to the President, subject to such instructions and regulations as may from time to time be issued by the President. For this purpose the Secretary of the Treasury is hereby authorized to assign such duties to the Commissioner of Internal Revenue, the internal revenue officers of the United States, and the Division of Customs, and to employ such additional assistants as he may deem necessary therefor.

"The Executive order dated August 10, 1917, providing for the organization of the United States Food Administration, so far as it is inconsistent herewith, is hereby modified.

WOODROW WILSON.

Washington, D. C.
September 2, 1917."

PROCLAMATION AND EXECUTIVE ORDER of December 8, 1917, limiting alcoholic content of malt liquors, viz.:

"Whereas, under and by virtue of an act of Congress entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved by the President on August 10, 1917, it is provided in section 15, among other things, as follows:

'Whenever the President shall find that limitation, regulation, or prohibition of the use of foods, fruits, food materials, or

feeds in the production of malt or vinous liquors for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquor, is essential, in order to assure an adequate and continuous supply of foods, or that the national security and defense will be subserved thereby, he is authorized, from time to time to prescribe and give public notice of the extent of the limitation, regulation, prohibition, or reduction so necessitated. Whenever such notice shall have been given and shall remain unrevoked, no person shall, after a reasonable time, prescribed in such notice, use any foods, fruits, food materials, or feeds in the production of malt or vinous liquors, or import any such liquors except under license issued by the President and in compliance with rules and regulations determined by him governing the production and importation of such liquors and the alcoholic content thereof.'

"Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers, conferred on me by said Act of Congress, do hereby find and determine that the national security and defense will be subserved by the limitation of the amount of foods, fruits, food materials, and feeds used in the production of malt liquor, and by reduction of the alcoholic content of malt liquor produced in the United States. And by this proclamation I prescribe and give public notice that on and after Janu-

ary 1, 1918, the total amount of foods, fruits, food materials, and feeds used by any person in the production of malt liquor shall not exceed seventy per cent. (70%) of the average consumption of any such foods, fruits, food materials, or feeds in the production of such malt liquor by such person during the period from January 1, 1917, to January 1, 1918, the unit of time to be fixed by regulation; and that on and after January 1, 1918, no malt liquor except ale and porter shall be produced in the United States containing more than two and three quarters per cent. (2.75%) of alcohol by weight.

"No person shall, after January 1, 1918, use any foods, fruits, food materials, or feeds in the production of malt liquor, unless he secures a license so to do, to be issued by the Commissioner of Internal Revenue, and complies with rules and regulations to be hereafter promulgated governing the production of such liquor and the alcoholic content; and no person shall import any such liquor except under license to be issued by the Division of Customs, Treasury Department, and in compliance with any rules and regulations governing the importation of such liquors which may be promulgated."

PROCLAMATION AND EXECUTIVE ORDER of September 16, 1918, prohibiting manufacture of malt liquors, viz.:

"Whereas, under and by virtue of an act of Congress, entitled 'An Act to provide further for the national security and defense

by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved by the President on August 10, 1917, it is provided in Section 15, among other things, as follows:

> 'Whenever the President shall find that limitation, regulation, or prohibition of the use of foods, fruits, food materials, or feeds in the production of malt or vinous liquors for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquor, is essential, in order to assure an adequate and continuous supply of food, or that the national security and defense will be subserved thereby, he is authorized, from time to time, to prescribe and give public notice of the extent of the limitation, regulation, prohibition, or reduction so necessitated. Whenever such notice shall have been given and shall remain unrevoked, no person shall, after a reasonable time prescribed in such notice, use any foods, fruits, food materials, or feeds in the production of malt or vinous liquors, or import any such liquors except under license issued by the President and in compliance with rules and regulations determined by him governing the production and importation of such liquors and the alcoholic content thereof.'

"Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers conferred on me by said Act of Congress, do hereby find and de-

termine that it is essential, in order to assure an adequate and continuous supply of food, in order to subserve the national security and defense, and because of the increasing requirements of war industries for the fuel productive capacity of the country, the strain upon transportation to serve such industries, and the shortage of labor caused by the necessity of increasing the armed forces of the United States, that the use of sugar, glucose, corn, rice, or any other foods, fruits, food materials and feeds in the production of malt liquors including near beer, for beverage purposes be prohibited. And by this Proclamation I prescribe and give public notice that on and after October 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except hops and malt now already made, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.

"In Witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done in the District of Columbia, this 16th day of September in the year of our Lord One Thousand Nine Hundred and Eighteen, and of the Independence of the

United States of America the One Hundred and Forty-third.

WOODROW WILSON.

By the President:
ROBERT LANSING,
Secretary of State."

PROCLAMATION AND EXECUTIVE ORDER of January 30, 1919, modifying proclamation of September 16, 1918, so as to permit the manufacture of beverages which are not intoxicating, viz.:

"Whereas, under and by virtue of an Act of Congress entitled 'An Act to Provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved August 10, 1917, the President, on the 16th day of September, 1918, made the following proclamation:

'Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers conferred on me by said act of Congress, do hereby find and determine that it is essential, in order to assure an adequate and continuous supply of food, in order to subserve the national security and defense, and because of the increasing requirements of war industries for the fuel productive capacity of the country, the strain upon transportation to serve such industries, and the shortage of labor caused by the necessity of increasing the armed forces of the United States, that the use of sugar, glucose, corn, rice, or

any other foods, fruits, food materials and feeds in the production of malt liquors including near beer, for beverage purposes be prohibited. And by this proclamation I prescribe and give public notice that on and after October 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except malt now already made, and hops, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.'

"And whereas the prohibition of the use of grain in the manufacture of beverages which are not intoxicating has been found by the President to be no longer essential in order to assure an adequate and continuous supply of food:

"Now, therefore, I do hereby modify the aforesaid proclamation made on the 16th day of September, 1918, to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating.

"In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done this thirtieth day of January in the year of Our Lord One Thousand Nine Hundred and Nineteen, and of the Independence

of the United States of America the One Hundred and Forty-third.

WOODROW WILSON.

By the President:
ROBERT LANSING,
Secretary of State."

PROCLAMATION AND EXECUTIVE ORDER of March 4th, 1919, further modifying proclamation of September 16th, 1918, so as to declare that "there is now an abundant supply" of food products, and limiting prohibition of food used in the production of intoxicating malt liquors for beverage purposes, viz.:

"Whereas, under and by virtue of an act of Congress entitled 'An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved August 10, 1917, the President on the 16th day of September, 1918, made a proclamation containing the following prohibition:

'I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, except hops and malt now already made, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in

the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.'

"And, whereas, the President, under authority of the said act of August 10, 1917, by further proclamation dated January 30, 1919, modified the said proclamation of September 16, 1918, so as to permit the use of grain in the manufacture of beverages which are not intoxicating, such proclamation providing as follows:

'Whereas the prohibition of the use of grain in the manufacture of beverages which are not intoxicating has been found by the President to be no longer essential in order to assure an adequate and continuous supply of food:

'Now, therefore, I do hereby modify the aforesaid proclamation made on the 16th day of September, 1918, to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating.'

"And whereas, for the production from a cereal base, of a non-intoxicating beverage, which shall be nutritious and palatable, food products other than grains, of which there is now an abundant supply, but of which the use for such purposes is prohibited by the aforesaid proclamation of September 16, 1918, are required:

"Now, therefore, I, Woodrow Wilson, President of the United States, do hereby amend the aforesaid proclamation of September 16, 1918, by inserting in the first sentence of the prohibiting paragraph, after the words

'production of' the word 'intoxicating' and by striking out of the same sentence the words 'including near beer'; and by inserting in the succeeding sentence in both places where the phrase 'production of malt liquors' occurs, after the words 'production of' the word 'intoxicating,' and striking out the phrases 'including near beer' and 'whether or not such malt liquors contain alcohol' in both places in that sentence where these phrases occur, so that as amended the prohibitory provisions of said proclamation shall read as follows:

> 'That the use of sugar, glucose, corn, rice or any other foods, fruits, food materials and feeds in the production of intoxicating malt liquors for beverage purposes be prohibited. And by this Proclamation I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice, or any other foods, fruits, food materials or feeds, except hops and malt now already made in the production of intoxicating malt liquors for beverage purposes, and on and after December 1st, 1918, no person shall use any sugar, glucose, corn, rice or any other foods, fruits, food materials or feeds, including malt, in the production of intoxicating malt liquors for beverage purposes, whether or not such malt liquors contain alcohol.'

and the aforesaid Proclamation of September 16, 1918, as thus amended, shall remain in full force and effect.

"In witness whereof I have hereunto set

my hand and caused the seal of the United States to be affixed.

"Done this 4th day of March in the year of our Lord One Thousand Nine Hundred and Nineteen and of the Independence of the United States of America the One Hundred and Forty-third.

(Signed) WOODROW WILSON.

FRANK L. POLK,
Acting Secretary of State."

PRESIDENT'S MESSAGE TO CONGRESS May 20, 1919.

"The demobilization of the military forces of the country has progressed to such a point that it seems to me entirely safe now to remove the ban upon the manufacture and sale of wines and beers, but I am advised that without further legislation I have not the legal authority to remove the present restrictions. I therefore recommend that the act approved November 21, 1918, entitled 'An act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June 30, 1919, the purpose of the act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," and for other purposes' be amended or repealed in so far as it applies to wines and beers."

VETO MESSAGE BY THE PRESIDENT OF THE UNITED STATES, October 27, 1919.

TO THE HOUSE OF REPRESENTATIVES:

I am returning, without my signature, H. R. 6810, "an act to prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries."

The subject matter treated in this measure deals with two distinct phases of the prohibition legislation. One part of the act under consideration seeks to enforce wartime prohibition. The other provides for the enforcement which was made necessary by the adoption of the constitutional amendment. I object to and cannot approve that part of this legislation with reference to wartime prohibition.

It has to do with the enforcement of an act which was passed by reason of the emergencies of the war and whose objects have been satisfied in the demobilization of the army and navy and whose repeal I have already sought at the hands of Congress. Where the purposes of particular legislation arising out of war emergency have been satisfied, sound public policy makes clear the reason and necessity for repeal.

It will not be difficult for Congress, in considering this important matter, to separate these two questions and effectively to legislate regarding them; making the proper distinction between temporary causes which arose out of wartime emer-

gencies and those like the constitutional amendment of prohibition which is now part of the fundamental law of the country.

In all matters having to do with the personal habits and customs of large numbers of our people we must be certain that the established processes of legal change are followed. In no other way can the salutary object sought or accomplished by great reforms of this character be made satisfactory and permanent.

WOODROW WILSON,
The White House, 27 October, 1919.

I. *Proclamations and Messages of the President.*

The President in his address to Congress on the occasion of the signing of the armistice between the United States and the Allied Powers and the Central Powers, stated:

> "The war thus comes to an end; for having accepted these terms of armistice it will be impossible for the German Command to renew it. . . . We only know that this tragical war, whose consuming flames swept from one nation to another until all the world was on fire, is at an end. . . . The arbitrary power of the military caste of Germany which once could secretly and of its own single choice disturb the peace of the world is discredited and destroyed." (Official U. S. Bulletin, Nov. 11, 1918, p. 5.)

President's Thanksgiving Proclamation 1918.

> "God has in His good pleasure given us peace. It has not come as a mere cessation of arms, a mere relief from the strain and tragedy of war. It has come as a great triumph of right. Complete victory has brought

us, not peace alone, but the confident promise of a new day as well, . . ." (Official U. S. Bulletin, November 18, 1918, page 1.)

President's Address to Congress, December 2, 1918.

"And now we are sure of the great triumph for which every sacrifice was made. It has come, come in its completeness, and with the pride and inspiration of these days of achievement quick within us we turn to the tasks of peace again,—a peace secure against the violence of irresponsible monarchs and ambitious military coteries and make ready for a new order, for new foundations of justice and fair dealing. . . .

"While the war lasted we set up many agencies by which to direct the industries of the country. . . . But the moment we knew the armistice to have been signed we took the harness off. . . . Great industrial plants whose whole output and machinery had been taken over for the use of the Government have been set free to return to the uses to which they were put before the war. . . . It has been the policy of the Executive, therefore, since the Armistice was assured (which is in effect a complete submission of the enemy) to put the knowledge of these bodies at the disposal of the business men of the country. . . . It is surprising how fast the process of returning to a peace footing has moved in the three weeks since the fighting stopped. . . . It was necessary that the administration of the railways should be taken over by the Government as long as the war lasted. . . . But all these interests have now been served, and the question is what is best for the railways and the public in the future." (Official U. S. Bulletin, December 2, 1918, page 5.)

Executive Order of December 3, 1918.

". . . Large quantities of office material, supplies and equipment . . . will fall into disuse because of the cessation of war activities." (Official U. S. Bulletin, December 5, 1918, page 4.)

Baruch's letter and President's reply of November 30, 1918.

Bernard M. Baruch, Chairman of the War Industries Board, on November 29, 1918, wrote to the President,

"There being no longer a necessity for the continuance of the War Industries Board, which was only a war-making body, . . . I am writing to suggest that the United States War Industries Board be discontinued as of January 1, 1919."

On November 30, 1918, the President replied,

". . . I agree with the conclusions to which you have come. . . ." (Official United States Bulletin, Dec. 5, 1918, pages 1 & 2.)

President's Address to American Army in France, on Dec. 25, 1918.

"I . . . realize how the quiet of peace and tranquility of settled hopes has descended upon us. . . ." (Official U. S. Bulletin December 27, 1918, page 3.)

President's Statement of April 23, 1918, on the Adriatic Question.

"The Austro-Hungarian Empire, then the enemy of Europe, and at whose expense the pact of London was to be kept in the event of victory, has gone to pieces and no longer exists. . . .

"The war was ended, moreover, by proposing to Germany an armistice and peace. . . . Upon these principles the peace with Ger-

many has been conceived, not only, but formulated." (United States Bulletin, April 28, 1919, page 3.)

Message to Congress of May 20, 1919.

"Many of the minor taxes . . . made necessary by the present necessities of the war time can hardly find sufficient justification under the easier circumstances of peace, and can now happily be got rid of . . . Our country has emerged from the war. . . ."

The President's Thanksgiving Proclamation, 1919.

" . . . A year ago our people poured out their heart in praise and thanksgiving that through Divine aid the right was victorious and peace had come to the nations which had so courageously struggled in defence of human liberty and justice. . . . These great blessings, vouchsafed to us, for which we devoutly give thanks, should arouse us to a fuller sense of our duty to ourselves and to mankind to see to it that nothing we may do shall mar the completeness of the victory which we helped to win." (New York Times, November 6, 1919, p. 17, column 4.)

The President in his *Armistice Commemoration Proclamation* said:

"A year ago today our enemies laid down their arms . . . impotent to renew hostilities, and gave to the world an assured opportunity . . . to work out in peace a new and juster set of international relations. . . .

"We ourselves had been in the conflict something more than a year and a half . . . our power was a decisive factor in the victory . . . and the victory of arms foretells the enduring conquests which can be made in peace. . . ." (New York Times, November 11, 1919.)

2. *As to Demobilization of the Army and Navy, President's Message to Congress of May 20, 1919.*

"The demobilization of the military forces of the country has progressed to such a point that it seems to me entirely safe now to remove the ban upon the manufacture and sale of wines and beers, . . ." (United States Bulletin, 26th of May, 1919, page 8.)

See also Veto Message of October 27, printed in full *supra.*

III.

Statements of the Executive Departments.

1. *Conclusion of the War.*

On December 20, 1918, the Provost Marshal General said: "With the war at an end, the Red Cross must turn its hand to the rehabilitation of devastated Europe" (U. S. Official Bulletin Dec. 20, 1918, p. 4).

The Chemical Warfare Service, Gas Defense Division, said: "Peace has come too soon to judge the results . . ." (U. S. Official Bulletin, November 27, 1918, p. 7).

Food Administrator Hoover, on November 11, 1918, said: "With the war effectually over, we enter into a new economic era . . ." (U. S. Official Bulletin, November 12, 1918, p. 3).

Secretary Daniels said: "During the war the Navy entered into a large number of contracts abroad. . . . It is the desire of the Department to close up these contracts . . ." (U. S. Official Bulletin, December 30, 1918, page 7).

Secretary of War Baker, in a press interview of May 7, 1919, said: "The buildings were originally put up for a base hospital and the war came to an end before they had been occupied." (United States Bulletin, May 12, 1919, page 14.)

The War Trade Board said: "For the war needs of the United States and the Allies the War Trade Board has limited the exportation of many commodities which may now be spared for general export trade, as they are no longer needed for war purposes . . ." (U. S. Official Bulletin, November 22, 1918, page 1).

The War Industries Board, on December 11, 1918, announcing the resignation of the Chairman

Bernard Baruch, said: ". . . the chairman . . . expressed the Government's appreciation of the . . . service which the steel industry had rendered the Government in solving its most important and vital industrial problems so essential to the winning of the war . . ." (U. S. Official Bulletin, December 12, 1918, page 4).

The United States Rail Administration said: "Because of the return to peace conditions differential rates . . . should become effective" (U. S. Official Bulletin, February 27, 1919, page 6).

The Director General of Railroads issued a statement, saying: "The war has been won. . . . The war now being practically over it will be the policy . . . to give the public the best service . . ." (U. S. Official Bulletin, December 11, 1918, pages 1 and 4).

Secretary of the Treasury and Director General McAdoo in a letter to Judge Simms, under date of December 11, 1918, said: "The war is ended." (U. S. Official Bulletin, December 12, 1918, pages 3 and 6.)

The United States Council of National Defense in a statement on the high cost of living, said: "At the war's end, our Allies had desperate need of the essentials of life . . . The entire nation—producer, distributor and consumer alike—should return to the unity that won the war . . . Our common duty now, fully as much as in the war, is to work and to save . . ." (United States Bulletin, October 13, 1919, page 10).

The War Department in a statement from the office of the Director of Sales, announcing the sale of army camps, said: ". . . when the war was over it (Camp Mills) was used as a debarkation camp . . ."

"Contonments which were constructed in Chickamauga and Chattanooga National Park, near Fort Oglethorpe, Ga.; for emergency use during the war are to be sold . . . During the war these cantonments were used for training engineer and medical troops . . .

"Practically all government owned improvements which were constructed at Newport News, Va., for use during the war will be sold . . . During the war more troops . . . were handled through Newport News than any other one port." (United States Bulletin, October 20, 1919, page 17.)

General Pershing in a letter said: "The end of the war has caused many to feel that further activity in support of this society (Red Cross) is not necessary . . ." (New York Times, November 8, 1919, page 12).

In his message on the occasion of the commemoration of the armistice, General Pershing wrote: "America must be as great in peace as America was great in war . . . Otherwise the victory achieved a year ago will be incomplete. . . ." (New York Times, November 11, 1918, page 18).

2. *As to the Demobilization of the Army and Navy.*

The War Department issued a circular stating "The President has determined . . . that the public service will be promoted by the discharge, as rapidly as their services can be spared, of officers in the United States Army . . ." (U. S. Official Bulletin, November 21, 1918, page 1).

Circular No. 152 of the War Department, under date of March 28, 1919, says: "Attention . . .

is directed to the importance of discharging from the military service . . . all men drafted or enlisted only for the period of the emergency . . ." (U. S. Official Bulletin, March 31, 1919, page 5).

A statement issued by the statistics branch, General Staff, War Department, sets forth: "The net decrease in the total commisioned and enlisted personnel from November 15 to March 11 was approximately 94 per cent." (U. S. Official Bulletin, March 28, 1919, page 6.)

Secretary Daniels issued a statement stating: ". . . It is the plan of the Department to close up all aviation stations at once and very shortly to return all supplies, munitions, etc., to America and to recall all the naval personnel ashore except the naval attaches and their assistants . . . The Department hopes to demobilize its forces in Europe within the next few weeks and to adjust all contracts and claims." (U. S. Official Bulletin, December 30, 1918, page 7.)

In a letter from the Secretary of War to Senator Martin on November 18, 1918, the Secretary said: ". . . In addition to the foregoing, plans have been made to begin the demobilization of the forces under arms in this country and to begin returning at once to the United States such portions of the armed forces abroad as are not needed for the purpose of occupying enemy territory . . . The demobilization in this country, however, can proceed at once . . . it is my earnest desire to restore the soldiers to their homes and their civil occupations, . . ." (U. S. Official Bulletin, November 25, 1918, page 4).

In a press interview the Secretary of War said: "The Acting Secretary of War Benedict Crowell has approved the sale or other disposition of the

following twelve camps: . . . When it became evident that these camps would not longer be needed, due to the demobilization of the Army, the Chief of the Construction Division was instructed to advertise . . . that these camps would be sold . . ." (United States Bulletin, May 8, 1919, page 1).

In a statement of the War Department from the office of the Director of Sales, relative to the sale of the army camps, and particularly the sale of Camp Mills: "Camp Mills was one of the large embarkation camps used in concentrating troops near the sea port after they had left the training centers, and when the war was over it was used as a debarkation camp by troops while en route to the various camps located throughout the country for demobilization. It is a remarkable achievement that the War Department has been able to bring all of the troops back from overseas and dispose of this large embarkation camp within one year of the signing of the armistice" (United States Bulletin, October 20, 1919, page 17).

General Pershing, in an interview published in the New York Times, November 11, 1919, on page 18, said: "Our armies have been demobilized and our citizen soldiers have returned again to civil pursuits."

The War Department in an official bulletin dated November 1, 1919, stated on October 27, 1919, that "from November 11, 1918, to October 23, 1919, a total of 3,411,509 troops were discharged."

Current newspapers report that the Navy has been reduced to even less than its authorized peace quota.

3. *As to the passing of the war emergency.*

Report of Secretary of the Treasury.

The Secretary of the Treasury in his annual report to the Speaker of the House of Representatives, dated December 2, 1918, says: ". . . The war has been won and peace is assured. . . .

"The pressure under which this report must be written, . . . together with the rapidly changing conditions incident to the transition from war to peace, make it impossible to do more at the moment than to give a hastily prepared narrative of the work of the Treasury. . . .

"In view of the assurance of peace, it has accordingly been recommended to the Congress that the pending revenue bill be modified . . ." (Official U. S. Bulletin, December 31, 1918, page 7).

Treasury Department Circular No. 129.

"The present emergency has created a condition whereby large quantities of office material, supplies and equipment now in the hands of the executive departments and other establishments of the Government in the District of Columbia will fall into disuse because of the cessation of war activities . . ." (Official U. S. Bulletin, December 11, 1918, page 1).

Removal of War-Time Restrictions upon the production of Soft Drinks:

The Chairman of the War Industries Board, on November 14th, 1918, announced: "The War Industries Board announces that by reason of the signing of the armistice, relieving to a great extent the necessity for saving man power, transportation, etc., the order recently put into effect

curtailing the production of soft drinks and mineral waters has been rescinded." (Official U. S. Bulletin, November 14, 1918, page 4.)

Announcement of the Food Administration:

"The signing of the armistice changed the situation regarding wheat immediately, just as it did with all measures taken with the needs of a continuing war in view. Wheat supplies in distant countries were made available by the cessation of the submarine menace and the assurance of a good crop in 1919, undisturbed by war, relieved somewhat the necessity of building up as large a reserve as was anticipated." (Official U. S. Bulletin, December 19, 1918, page 6.)

Announcement of the United States Shipping Board Emergency Fleet Corporation:

"This action is to be carried out because the war emergency and necessity under which the ships were taken over has passed." (In speaking of the return of the Dutch Ships.) (United States Official Bulletin, February 3, 1919, page 1.)

IV.

Revised Text of the Armistice

In the course of his address to the Congress on November 11, 1918, President Wilson read the original text of the armistice agreement, which had been sent by cable to the United States Government before that agreement had been signed at Marshal Foch's headquarters by Germany's delegated representatives. Before its conditions were accepted and the document was signed, several important changes were made from the original text. The complete revised text of the armistice, as signed on November 11, 1918, follows, the altered clauses being printed in italic type:

I—Military Clauses on Western Front

One—Cessation of operations by land and in the air six hours after the signature of the armistice.

Two—Immediate evacuation of invaded countries: Belgium, France, Alsace-Lorraine, Luxemburg, so ordered as to be completed within fourteen days from the signature of the armistice. German troops which have not left the above-mentioned territories within the period fixed will become prisoners of war. Occupation by the Allied and United States forces jointly will keep pace with evacuation in these areas. All movements of evacuation and occupation will be regulated in accordance with a note annexed to the stated terms.

Three—Repatriation beginning at once to be completed within fifteen days of all the inhabitants of the countries above enumerated (including hostages, persons under trial or convicted).

Four—Surrender in good condition by the German Armies of the following war material: Five thousand guns (2,500 heavy, and 2,500 field), 25,000 machine guns, 3,000 minenwerfer, 1,700 airplanes (fighters, bombers—firstly, all of the D 7's and all the night bombing machines). The above to be delivered in situ to the Allied and United States troops in accordance with the detailed conditions laid down in the note (annexure No. 1) drawn up at the moment of the signing of the armistice.

Five—Evacuation by the German armies of the countries on the left bank of the Rhine. The countries on the left bank of the Rhine shall be administered by the local troops of occupation. The occupation of these territories will be carried out by Allied and United States garrisons holding the principal crossings of the Rhine (Mayence, Coblenz, Cologne), together with the bridgeheads at these points of a thirty-kilometer radius on the right bank and by garrisons similarly holding the strategic points of the regions. A neutral zone shall be reserved on the right bank of the Rhine between the stream and a line drawn parallel to the bridgeheads and to the stream and at a distance of ten kilometers from the frontier of Holland up to the frontier of Switzerland. The evacuation by the enemy of the Rhine lands (left and right bank) shall be so ordered as to be completed within a further period of sixteen days, in all, thirty-one days after the signing of the armistice. All the movements of evacuation or occupation are regulated by the note (annexure No. 1) drawn up at the moment of the signing of the armistice.

Six—In all territories evacuated by the enemy there shall be no evacuation of inhabitants; no damage or harm shall be done to the persons or property of the inhabitants. No person shall be prosecuted for offenses of participation in war measures prior to the signing of the armistice. No destruction of any kind shall be committed. Military establishments of all kinds shall be delivered intact, as well as military stores of food, munitions, and equipment not removed during the time fixed for evacuation. Stores of food of all kinds for the civil population, cattle, etc., shall be left in situ. Industrial establishments shall not be impaired in any way and their personnel shall not be removed.

Seven—Roads and means of communication of every kind, railroads, waterways, main roads, bridges, telegraphs, telephones, shall be in no manner impaired. All civil and military personnel at present employed on them shall remain. Five thousand locomotives and one hundred and fifty thousand wagons in good working order, with all necessary spare parts and fittings, shall be delivered to the associated Powers within the period fixed in annexure No. 2, and total of which shall not exceed thirty-one days. There shall likewise be delivered five thousand motor-lorries (camion automobiles) in good order, within the period of thirty-six days. The railways of Alsace-Lorraine shall be handed over within the period of thirty-one days, together with pre-war personnel and material. Further, the material necessary for the working of railways in the countries on the left bank of the Rhine shall be left in situ All stores of coal and material for the upkeep of permanent ways, signals, and repair shops shall

be left in situ. These stores shall be maintained by Germany in so far as concerns the working of the railroads in the countries on the left bank of the Rhine. All barges taken from the Allies shall be restored to them. The note (annexure No. 2) regulates the details of these measures.

Eight—The German command shall be responsible for revealing within the period of forty-eight hours after the signing of the armistice all mines or delayed-action fuses on territory evacuated by the German troops and shall assist in their discovery and destruction. It also shall reveal all destructive measures that may have been taken (such as poisoning or polluting of springs and wells, etc.). All under penalty of reprisals.

Nine—The right of requisition shall be exercised by the Allied and United States armies in all occupied territories, subject to regulation of accounts with those whom it may concern. The upkeep of the troops of occupation in the Rhineland (excluding Alsace-Lorraine) shall be charged to the German Government.

Ten—The immediate repatriation without reciprocity, according to detailed conditions which shall be fixed of all Allied and United States prisoners of war, including persons under trial or convicted. The Allied Powers and the United States shall be able to dispose of them as they wish. This condition annuls the previous conventions on the subject of the exchange of prisoners of war, including the one of July, 1918, in course of ratification. However, the repatriation of German prisoners of war interned in Holland and in Switzerland shall continue as before. The repatriation of German prisoners of war shall be regulated at the conclusion of the preliminaries of peace.

Eleven—Sick and wounded who cannot be removed from evacuated territory will be cared for by German personnel, who will be left on the spot with the medical material required.

II—Disposition Relative to the Eastern Frontiers of Germany

Twelve—All German troops at present in the territories which before belonged to Austria-Hungary, Rumania, Turkey, shall withdraw immediately within the frontiers of Germany as they existed on August 1, 1914. All German troops at present in the territories which before the war belonged to Russia shall likewise withdraw within the frontiers of Germany, defined as above, as soon as the Allies, taking into account the internal situation of these territories, shall decide that the time for this has come.

Thirteen—Evacuation by German troops to begin at once, and all German instructors, prisoners, and civilians as well as military agents now on the territory of Russia (as defined before 1914) to be recalled.

Fourteen—German troops to cease at once all requisitions and seizures and any other undertaking with a view to obtaining supplies intended for Germany in Rumania and Russia (as defined on August 1, 1914).

Fifteen—Renunciation of the treaties of Bucharest and Brest-Litovsk and of the supplementary treaties.

Sixteen—The Allies shall have free access to the territories evacuated by the Germans on their eastern frontier, either through Danzig or by the Vistula, in order to convey supplies to the populations of those territories and for the purpose of maintaining order.

III—Clause Concerning East Africa

Seventeen—Evacuation by all German forces operating in East Africa within a period to be fixed by the Allies.

IV—General Clauses

Eighteen—Repatriation, without reciprocity, within a maximum period of one month in accordance with detailed conditions hereafter to be fixed of all interned civilians, including hostages and persons under trial or convicted, belonging to the Allied or associated Powers, other than those enumerated in Article Three.

Nineteen—The following financial conditions are required: Reparation for damage done. While such armistice lasts no public securities shall be removed by the enemy which can serve as a pledge to the Allies for the recovery or reparation for war losses. Immediate restitution of the cash deposit in the National Bank of Belgium, and in general immediate return of all documents, specie, stocks, shares, paper money, together with plant for the issue thereof, touching public or private interests in the invaded countries. Restitution of the Russian and Rumanian gold yielded to Germany or taken by that power. This gold to be delivered in trust to the Allies until the signature of peace.

V—Naval Conditions

Twenty—Immediate cessation of all hostilities at sea and definite information to be given as to the location and movements of all German ships. Notification to be given to neutrals that freedom of navigation in all territorial waters is given to the naval and mercantile marines of the Allied

and associated Powers, all questions of neutrality being waived.

Twenty-one—All naval and mercantile marine prisoners of the Allied and associated Powers in German hands to be returned without reciprocity.

Twenty-two—Surrender to the Allies and United States of all submarines (including submarine cruisers and all mine-laying submarines) now existing, with their complete armament and equipment, in ports which shall be specified by the Allies and the United States. Those which cannot take the sea shall be disarmed of the personnel and material and shall remain under the supervision of the Allies and the United States. The submarines which are ready for the sea shall be prepared to leave the German ports as soon as orders shall be received by wireless for their voyage to the port designated for their delivery, and the remainder at the earliest possible moment. The conditions of this article shall be carried into effect within the period of fourteen days after the signing of the armistice.

Twenty-three—German surface war-ships which shall be designated by the Allies and the United States shall be immediately disarmed and thereafter interned in neutral ports or in default of them in Allied ports to be designated by the Allies and the United States. They will there remain under the supervision of the Allies and of the United States, only caretakers being left on board. The following war-ships are designated by the Allies: Six battle cruisers, ten battle-ships, eight light cruisers (including two mine-layers), fifty destroyers of the most modern types. All other surface war-ships (including river craft) are to be concentrated in German naval bases to be

designated by the Allies and the United States and are to be completely disarmed and classed under the supervision of the Allies and the United States. The military armament of all ships of the auxiliary fleet shall be put on shore. All vessels designated to be interned shall be ready to leave the German ports seven days after the signing of the armistice. Directions for the voyage will be given by wireless.

Twenty-four—The Allies and the United States of America shall have the right to sweep up all mine-fields and obstructions laid by Germany outside German territorial waters, and the positions of these are to be indicated.

Twenty-five—Freedom of access to and from the Baltic to be given to the naval and mercantile marines of the Allied and associated Powers. To secure this the Allies and the United States of America shall be empowered to occupy all German forts, fortifications, batteries, and defense works of all kinds in all the entrances from the Cattegat into the Baltic, and to sweep up all mines and obstructions within and without German territorial waters, without any question of neutrality being raised, and the positions of all such mines and obstructions are to be indicated.

Twenty-six—The existing blockade conditions set up by the Allied and associated Powers are to remain unchanged, and all German merchant-ships found at sea are to remain liable to capture. The Allies and the United States should give consideration to the provisioning of Germany during the armistice to the extent recognized as necessary.

Twenty-seven—All naval aircraft are to be concentrated and immobilized in German bases to be specified by the Allies and the United States of America.

Twenty-eight—In evacuating the Belgian coast and ports Germany shall abandon in situ and in fact all port and river navigation material, all merchant-ships, tugs, lighters, all naval aeronautic apparatus, material, and supplies, and all arms, apparatus, and supplies of every kind.

Twenty-nine—All Black Sea ports are to be evacuated by Germany; all Russian war-vessels of all descriptions seized by Germany in the Black Sea are to be handed over to the Allies and the United States of America; all neutral merchant-vessels seized are to be released; all warlike and other materials of all kinds seized in those ports are to be returned and German materials as specified in clause Twenty-eight are to be abandoned.

Thirty—All merchant-vessels in German hands belonging to the Allied and Associated Powers are to be restored in ports to be specified by the Allies and the United States of America without reciprocity.

Thirty-one—No destruction of ships or of materials to be permitted before evacuation, surrender, or restoration.

Thirty-two—The German Government will notify the neutral Governments of the world, and particularly the Governments of Norway, Sweden, Denmark, and Holland, that all restrictions placed on the trading of their vessels with the Allied and associated countries, whether by the German Government or by private German interests, and whether in return for specific concessions, such as the export of shipbuilding materials, or not, are immediately canceled.

Thirty-three—No transfers of German merchant shipping of any description to any neutral flag are to take place after signature of the armistice.

VI—Duration of Armistice

Thirty-four—The duration of the armistice is to be thirty days, with option to extend. During this period if its clauses are not carried into execution the armistice may be denounced by one of the contracting parties, which must give warning forty-eight hours in advance. It is understood that the execution of Articles 3 and 18 shall not warrant the denunciation of the armistice on the ground of insufficient execution within a period fixed, except in the case of bad faith in carrying them into execution. In order to assure the execution of this convention under the best conditions, the principle of a permanent international armistice commission is admitted. This commission will act under the authority of the Allied military and naval Commanders in Chief.

VII—The Limit for Reply

Thirty-five—This armistice to be accepted or refused by Germany within seventy-two hours of notification.

This armistice has been signed the Eleventh of November, Nineteen Eighteen, at 5 o'clock French time.

F. Foch.
R. E. Wemyss.
Erzberger.
A. Oberndorff.
Winterfeldt.
Von Sadow.

V.

Recent and unreported Opinions.

District Court of the United States

FOR THE DISTRICT OF RHODE ISLAND.

Narragansett Brewing Company v. Harvey A. Baker, United States Attorney, and George F. O'Shaunessy, Collector of Internal Revenue.	Equity No. 105.

OPINION ON PLAINTIFF'S PETITION FOR A PRELIMINARY INJUNCTION.

November 12, 1919.

Brown, J.

The question now before the Court is whether the plaintiff is entitled to a preliminary injunction against these defendants, to restrain, until final hearing, enforcement of that portion of the "National Prohibition Act" comprised in "title I: To provide For the Enforcement of War Prohibition."

The Act was passed over the President's veto by the House on October 27, and by the Senate on October 28, 1919.

The plaintiff's allegations that irreparable injury will result from the enforcement of the Act

are not disputed. Upon the present record it appears that the plaintiff manufactures and sells fermented malt liquors containing in excess of one-half of one per centum of alcohol by volume, and which are included in the terms of the Act. The bill alleges that the plaintiff's products are not, in fact, intoxicating when used for beverage purposes, and numerous affidavits are filed in support of this allegation. The allegations of the bill, and the affidavits, are not contradicted.

The defendants contend that the definitions and classifications of the Act, for the purposes of the enforcement of the Act, are controlling, irrespective of distinctions between the intoxicating and non-intoxicating qualities of beverages that are specifically defined by the Act as included in its provisions.

In justification of the right of Congress to classify beverages that are in fact non-intoxicating, because of their small alcoholic content, with intoxicating beverages, defendants cite *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, and the language of Mr. Justice Hughes on page 204:

> "It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the 'Sale of malt liquors.' In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law."

The question how far this decision as to the power of a state to prohibit non-intoxicating beverages, as an incident to the exercise of power to prohibit intoxicants, is applicable upon the question of the power of the United States to prohibit the states from permitting the manufacture and sale of non-intoxicants, may be reserved for final hearing. It involves a question concerning the conflict of national and state powers that did not arise in the case cited.

We may assume for this hearing that as incidental to such power as Congress might possess to prohibit intoxicants it might also prohibit non-intoxicants, upon the principle stated in *Purity Extract Co.* v. *Lynch*, 226 U. S. 192.

The defendants contend that the Act is constitutional as an exercise of the war powers found in Article 1, Sec. 8 of the Constitution, and assert their right and duty to enforce, at the present time, the terms of the Act.

The plaintiff's contention that the Act is repugnant to the 18th Amendment raises, as the defendants rightly contend, a question of the power of Congress. This question is not an abstract question as to general powers, or of the limitation of these powers to times of existing conflict of arms, as distinguished from a theoretical state of war, and we may recognize general power

> "to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress."
>
> *Stewars* v. *Kahn*, 11 Wall. 493, 507.

We have a concrete question as to whether this Act of Congress is an attempt to legislate upon

a specific matter which already has been specifically dealt with by the Amended Constitution, by provisions which secure to the plaintiff the right to conduct its business under the laws of the state which created it, for a definite period. Does this legislation conflict with, and attempt to nullify, substantial provisions of the 18th Amendment?

In *Mugler* v. *Kansas*, 123 U. S. 661, it was said:

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, *or is a palpable invasion of rights secured by the fundamental law*, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

The defendants contend that the 18th Amendment does not go into effect until January, 1920; therefore there can be no inconsistency between the Act of Congress and the Amendment before that date; and that, therefore, Congress has full power to enact and enforce prohibition laws during that period without inconsistency or conflict with that Amendment. This is in effect a denial that the 18th Amendment secured to the Governments of the states and municipalities, and to the citizens of the states, during the period between ratification of the Amendment and the prescribed date of enforcement, any rights which are not subject to the will of Congress during such portion of that period as a state of war may continue.

This argument seems to be based upon an erroneous view of the time when the 18th Amendment took effect, and upon a disregard of the true meaning and effect, and of the high importance of the time provision contained in the Amendment.

This Amendment must be read as a whole; the significance of none of its words can be ignored, since it must be regarded as the expression of the will of the people in putting into the Constitution, as a part of the fundamental law of the land, provisions which were to be the supreme law both in war and in peace. The Amendment becomes a part of the Constitution immediately upon its ratification. It then fixed the time at which the powers of the states over a subject heretofore always under their control should cease; at which the Government of the United States, the governments of the state and of municipalities, should be deprived of sources of revenue from which millions had been derived; at which great industries, employing thousands of men, should cease, and at which the value of enormous properties for the uses for which they were designed should be finally destroyed; and at which there should be enforced a radical change in personal habits. It is inconceivable that this would have been done without the provision for a period during which the enormous loss might be, to some extent, provided for and lessened.

The Amendment provided not only for what should be done after January, 1920, but, by the words "After one year," gave express evidence of consideration and determination of the necessity of affording to the states and citizens, and to the departments of the Federal Government as well, a period of readjustment of their affairs to the new conditions that would result from a transfer of powers from the states to the Federal Government.

By Section 2 of the Amendment the power of

Congress and of the several states was defined in the words—

> "Shall have concurrent power to enforce this article by appropriate legislation."

Congress in other titles of the Act has already acted under Section 2, in enacting provisions which it considers appropriate to enforcement of Section 1 of the Amendment.

Reading the amended constitution as a whole, can we find an intention of the people that the express and special provisions relating to the time of transfer of powers from states to the National Government are subject to the right of Congress under its war powers to annul all rights of the states and of their citizens, which would be preserved to them if Congress were restricted in legislating upon this subject to legislation appropriate to the enforcement of Section 1?

There can be no question that the present legislation, if valid, destroys rights of states and citizens which, but for that legislation, they might enjoy, and which were respected and recognized in the adoption of the Amendment.

There can be no question of the gravity of the conflict between the assertion of the rights measured by the terms of the Amendment alone, and the denial of those rights under Article 1, Section 8. This conflict can be avoided only by limiting the Amendment by reading into it an implied condition that it is subject to modification by Congress, in respect to the time at which prohibition shall go into effect, and the rights of states and citizens be annulled or suspended, or by limiting the right of Congress to exercise its powers during the particular period between the dates of ratification and the date set for enforcement.

But this conflict is not between law-making bodies, one of which has war powers and the other not. The power of the people during war to amend the supreme law is a power superior to that of Congress, which derives all its war power from the supreme law which the people may from time to time enact.

As the Amendment and the original Article 1 are from the same source of power,—equally enactments by the same law-making power,—the question of which provision shall yield to the other cannot be solved merely by reference to a grant of war powers and the existence of a state of war. The Act of Congress is a measure for war only; the Amendment is a measure equally for war and peace. *Ex parte Milligan*, 4 Wall. 2, 120, 121:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

Can it be said that this specific time provision did not contemplate a change of the Constitution during war, and therefore it must abate during war?

In considering the true meaning of the Amendment, and the importance to be given to its time provision, we should consider the historical condition existing at the time of the passing the Amendment. *Maxwell* v. *Dow*, 176 U. S. 581; *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429.

The whole history of the Amendment is a war history; all was done in war time. The people

were called upon to consider the emergencies and exigencies of war, and also the emergency of a great change in the Constitution and great destruction of state and municipal rights, of property and of values, that must follow from the Amendment; a destruction so great and general as to have a close analogy to the destruction that might result from war itself. The time provision was to avert or lessen the calamity, and in itself is an expression of a judgment that the existing emergency of war was not inconsistent with the grant of a year to meet the emergency of a change in Constitutional powers, and to avoid the destruction of property from the emergency of a destruction of state rights.

The judicial power is indispensable:

> "not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government."
>
> *Ableman* v. *Booth,* 21 How. 506, 520.

We have in the 18th Amendment a reservation of their power to the states for a period of one year from the date of ratification: Yet this Act assumes to define public and common nuisances, and provided for suits in equity to abate such nuisances, "in any court having jurisdiction to hear and determine equity causes," and that jurisdiction of Courts of the United States shall be concurrent with that of the courts of the several states.

Aside from the question of the repugnancy of this Act to the Amended Constitution there are questions of the most serious character as to whether this legislation does not contain pro-

visions which go far beyond permissible exercise of any constitutional war powers.

The question whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a mere arbitrary fiat, is a judicial question. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201-2; *Mugler* v. *Kansas*, 123 U. S. 623, 661.

This question is raised, and in view of the lapse of time since the cessation of hostilities, and of the facts proclaimed by the President, it cannot now be said that it is without foundation. It may be reserved for final hearing. Nor are we now to decide any questions as to the legality of the adoption of the 18th Amendment, or its validity. They have not been argued, and will not be decided. It is assumed that the 18th Amendment is now a part of the Constitution, as declared by the Secretary of State.

It is obvious that a decision that the provisions of the Act are so broad as to be inconsistent with the 18th Amendment and to defeat its purpose, does not affect the powers of Congress over National Territory, nor the exercise of war powers, or other powers, reasonably and consistently with the object of affording the states and citizens thereof an opportunity for readjustment to new conditions, and to avoid losses.

> "Where two principles come in conflict with each other the court must give them both a reasonable construction so as to preserve them both to a reasonable extent."

Marshall, C. J., cited in *Mason* v. *U. S.*, 244 U.S. 362.

When a particular application of a general authority will lead to the destruction of a specific

provision for a special emergency, the general grant is limited only so far as is essential to preserve the intent of the special provision.

I am of the opinion that the time provision contained in the 18th Amendment is an essential and inseparable part of that Amendment; that without it, it would not have been submitted to the people, and would not have been adopted; that it is an express provision made to cover the special emergency of a radical change in the Constitution, and to obviate immediate destruction of the rights of states and of citizens.

In view of the probability that the Act in question will ultimately be held unconstitutional, and of the irreparable damage that would result from its immediate enforcement, and as, in view of the evidence afforded by the Presidential proclamations and other circumstances its immediate enforcement is not imperative, I am convinced that the plaintiff's right to a preliminary injunction is clear.

Petition for Preliminary Injunction granted.

A draft decree may be presented accordingly.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ALPHONS DRYFOOS and others,

against

WILLIAM H. EDWARDS, Collector of Internal Revenue.

JACOB RUPPERT, Inc.,

against

FRANCIS G. CAFFEY, United States Attorney, and RICHARD J. MCELLIGOTT, Deputy Collector of Internal Revenue.

These cases came up on motions by the plaintiffs for temporary injunctions. In the first case the motion was to enjoin the collector from interfering with the withdrawal and sale for beverage purposes in the United States of certain distilled spirits. In the second the motion was to enjoin the district attorney and the deputy collector from enforcing the penalties against the plaintiffs of Title I of the National Prohibition Act because of its proposed sale of non-intoxicating beer containing more than one-half of one per cent. and not more than 2.75% of alcohol.

The defendants moved in each case to dismiss the bills.

The bills present the question of the constitutionality of the War Time Prohibition Act and of

Title I of the National Prohibition Act, which establishes a definition of the words, "beer, wine or other intoxicating malt or vinous liquor," as used in the War Time Prohibition Act, and provides a procedure for the enforcement of the earlier act. In the first case the plaintiffs allege that they are the owners of four hundred and seventy-four packages of distilled spirits, which had been lawfully made before the War Time Prohibition Act went into effect or had been passed(at least it is conceded that the bill shall be so understood), and which had been entered or deposited for storage in government warehouses and transferred in bond. That the defendant had refused to permit the withdrawal of any such distilled spirits and continued to refuse it. That the armistice between the German Government and the United States was accepted on November the eleventh, 1918, and that the United States in its various departments has suspended all war-time activity and has demobilized its forces, as appears from official communications of the President. That its army and navy has been reduced to less than its peace quota and that various other of the interruptions of normal industry and intercourse occasioned by war have terminated. That the only constitutional basis of the War Time Prohibition Act was under the war powers of the government, and had ceased to exist, so that the act itself was no longer in force.

The second bill alleges that the plaintiff is the owner of three plots of real estate in the City of New York to the value of nearly two million dollars, on which is erected a brewing plant with all its equipment to the value of over ten million dollars. That it has been engaged in the manufac-

ture of malt liquors since 1910 to an annual amount of more than eight million dollars. That since January first, 1918, it has discontinued the manufacture and sale of beer of more than 2.75% alcohol, which does not intoxicate. That it had on hand on October twenty-eighth, 1918, a large number of barrels of beer containing 2.75% of alcohol, on which day Congress passed Title I of the National Prohibition Act, making its sale thereafter illegal. That for some six months before October twenty-eighth, 1919, no general emergency had existed warranting such prohibition by Congress either military or otherwise. That the armistice had been accepted by Germany and Austria on November eleventh, 1918, and that the President had proclaimed that prohibition was no longer necessary on October twenty-seventh, 1919, in a message in which he vetoed the National Prohibition Act. That in this message he had proclaimed that the army and navy had been demobilized and the other objects of the War Time Prohibition Act had been satisfied. That this was in fact the case, and that most of the boards of governmental instrumentalities appointed to carry on the war had been disbanded. That the effect of Title I was to destroy the valuable business and goodwill of the plaintiff, to dissipate its staff of employees and to reduce its plant to a junk or salvage value only. That the act is unconstitutional and that the defendants, in enforcing the same, will be acting without warrant of law.

The plaintiff in the second case submitted certain affidavits supporting in detail the allegations of the bill, showing that the reduction of the beer on hand from 2.75% to one-half of one per cent. of alcohol will involve the loss of a large sum of

money, also showing that the use of 2.75% beer was not intoxicating.

The whole point in issue is the constitutionality of the two acts, the first as affecting the plaintiffs in the first suit and the second as affecting the plaintiff in the second suit.

Walter C. Noyes, M. J. Stroock, Arthur L. Strasser for Alphons Dryfoos and others.

Elihu Root, William D. Guthrie, William L. Marbury for Jacob Ruppert, Inc.

William L. Frierson, Francis G. Caffey and Earl B. Barnes for the Defendants.

Learned Hand, D. J.: The War Time Prohibition Act was passed on November twenty-first, 1918, ten days after the acceptance of the terms imposed by the Allies upon the German Government and when the Empire had fallen. The circumstances were then such as made patent to everyone that successful hostilities could not be resumed and, as the President declared to Congress a few weeks later, the war had come to an end. If, therefore, the war powers of Congress were dependent upon the prosecution of further hostilities in the field, they had ceased. However, no one urges that this was the case. Everyone agrees that to some extent at least Congress had the power to take steps necessary to insure the observance of the terms of the armistice and to demobilize the forces which had been called to the colors. The second admission is, however, significant to this extent, that it concedes that the powers of Congress do not terminate at once with the cessation of hostilities, but that they include the power to restore, in certain respects anyway, the status quo ante bellum. It therefore becomes

necessary to inquire how far the powers of Congress go to that end.

It seems to me rather a barren question whether the so-called war powers are to be drawn from the express power "to declare war," though that has been said at times, *Miller* v. *United States*, 11 Wall. 268, 305, *ex parte Milligan*, 4 Wall. 2, 139 (per Chase, C. J.), or whether it is to be found in the added power "to raise and support armies," or whether it is to be inferred from the fact that the United States is the only sovereign recognized among the world of nations, within the territory of the United States, at once responsible and vested with any of the powers which are customarily exercised by such a sovereign so charged, *Juilliard* v. *Greenman*, 110 U. S. 421, 447, 449, 450. The real question is of the limits after the cessation of hostilities of the powers of Congress to unravel the results which war has caused. That it has some such powers, as I have said, cannot be denied. The forces must be demobilized, the unnecessary accumulation of supplies must be sold, the railroads must be returned, or some other valid status given them, the ships, built and building, must be disposed of, contracts must be cancelled, and the immense organization of workmen and of factories and machinery must be restored to the general industrial life of the nation. So much at least is within the powers of Congress, and in the execution of its powers it is not limited narrowly. *Veazie Bank* v. *Fenno*, 8 Wall. 533, *The Legal Tender Cases*, 12 Wall. 457.

Now I cannot see why it should be thought a legitimate concern of Congress to deliver its soldiers and workmen to the places whence they

came, and yet be held totally beyond its ken to inquire into the conditions which they must meet upon their arrival. The nation is today the employer of thousands of men upon the railways which it holds not by virtue of the interstate commerce clause, but under its war powers. It has discharged some four million soldiers and immense numbers of workmen from industries suddenly discontinued by the war. The inevitable industrial adjustments, which so enormous and sudden an influx into the industries of the country involve, are a direct and immediate result of the war. They are one of the consequences of a return to a peace footing quite as inextricably involved in the prosecution of war, as the disposal of its accumulated supplies and munitions. As to the last, Congress might prescribe rules as to how they should be marketed, perhaps indeed might even regulate their prices till the effect of the new supply was absorbed. Is not the same rule to apply to its men? The responsibility for some adequate provision against the immediate results of military and industrial demobilization is national, because it was the nation for its own purposes that chose to produce them. No doubt the States might in a measure deal with them, but the nation has neither the duty nor the right to abandon the problems that it alone has raised. It was for war that these men were taken from their work; it was for war that unaccustomed duties were imposed upon them; and it may prove of vital importance in another war whether the nation disregards all further duty to them, as soon as they are discharged.

Now a policy of prohibition rests, or at any may rest, upon the belief that the use of intoxi-

cating drink will provoke discontent, disorder, economic waste, and industrial friction and maladjustment among this class and during this period. With the correctness of that belief, of course, I have nothing to do; it is enough that it has been long and very widely held. If so, the only question, as I view it, is whether such prohibition has any genuine relation to this object, though hostilities be over, demobilization completed and the production of military supplies and munitions have ceased. Prohibition may not be the measure of our national responsibility,—but it is obviously a step which honest men may believe to look to its discharge. Nor can it be said that the means were more extended than the occasion required, for it is apparent that it may not be practical to prohibit the sale of intoxicants to demobilized soldiers, workmen and to railway employees without including the community at large. They permeate every corner of the land and mingle freely and indistinguishably with all citizens. Constituting no longer an ascertainable class, they cannot be kept from access to intoxicants unless the prohibition be general. Whether the result is worth the sacrifice, whether it was in fact the reason of the decision of Congress, whether it was necessary to include all kinds of intoxicants, even the milder beverages, may indeed be open to doubt, but those are matters which the court may not consider.

I need not inquire whether Congress could extend such a law beyond the declaration of peace. Apparently it was thought that its war powers so extended in *Stewart* v. *Kahn*, 11 Wall. 493, in a case quite dissimilar on the facts. In any event, I do not, of course, suggest that under such a

guise Congress might indefinitely legislate for the country at large. But most constitutional problems in the end resolve themselves into the question, how far, and there is no royal road to their solution by rhetorically conjuring up outrageous possibilities which may arise from their unflinching application. All I need do here is to say that until the declaration of peace Congress has power to deal with a matter directly arising from the prosecution of war and so I hold.

But is is said that the statute itself shows that its purpose was to extend only until demobilization and that it must fail when that purpose is accomplished. Ignoring the rule that preambles are not in any case controlling, *Price* v. *Forrest*, 173 U. S. 410, 427, *U. S.* v. *Webster*, 23 Fed. Cas. 16,658, the recent action of Congress shows that whatever its original purpose, it now means to continue the measure, regardless of the purposes of the preamble. Title I of the National Prohibition Act was passed over the veto of the President in which he said that demobilization was complete and that the other original purposes of the act were fulfilled. It would be preposterous to suppose that Congress repassed the act, because it disagreed with that statement. The only possible explanation is that it had other purposes in mind, as indeed the plaintiffs stoutly assert. But Title I was avowedly ancillary to the War Time Prohibition Act and designed to make it effective. It assumes the existence of that act, and if the latter had indeed come to an end, because its purpose had been accomplished, the second statute would, I think, have revived it, if Congress had power to do so. And even if Title I of the later Act be not such a revival, the language of the earlier is

too explicit to admit of the necessary interpretation from its preamble. Judged merely by its language it meant to impose prohibition for a period not yet completed, and if that period went beyond the declared purpose, it was not on that account invalid, provided it could depend upon other powers which Congress actually had, but did not expressly invoke. No statute need recite all the grounds which may be urged for its validity. Again it is earnestly insisted that as used in the act, the phrase "conclusion of the war" meant cessation of hostilities. I do not regard that question as material. Even if it were true, the statute by its terms was not to end until the President proclaimed demobilization. That he certainly has not done. He may be right or wrong in his understanding of the law, but it has nothing to do with the fact that he has not yet done that which Congress meant him to do to bring the statute to an end, and until he does, it endures.

I am content to accept for argument's sake the rule suggested by the plaintiffs, that the validity of a statute must depend upon the state of facts at the moment when it impinged upon the individual. Following the intimations obiter in *Perrin* v. *U. S.*, 232 U. S. 478, 486, *Johnson* v. *Geralds*, 234 U. S. 422, 447. I agree that the War Time Prohibition Act may have been valid in July (*Hoffmann* v. *McElligott*, 259 Fed. R. 525) and in August (*Scalena* v. *Caffey*, N. Y. Law Journal, August 26, 1919), and yet be invalid in November. But the question now is, whether on the later day, notwithstanding the completion of its original purposes, it was invalid, because Congress had no power to pass it. I have already given the reasons which lead me to an opposite conclusion.

However, the plaintiffs say, granted that Congress might have had an independent power to pass the act if the President had concurred, as between Congress and the President, I must accept the decision of the latter, since upon him is laid the whole responsibility for the conduct of war. As I understand this argument it involves the premise that while Congress may declare war and presumably may place in the President's hand the means for its successful prosecution, he alone may determine when the occasion has arisen for their use, and that, speaking concretely, since he has said that there is no further occasion for war-time prohibition, Congress had no independent power to continue it in operation. Such a doctrine has no support in authority, and the practice in war has not tended to give it support. Nor does it appear to have any basis in principle. The President is, it is true, the Commander in Chief of the armed forces of the United States and their ordering and disposition rests with him, as does that of all the supplies and munitions which Congress may provide. Yet provision for a state of war is not vested in the President. He can enact no rules of general conduct, he can levy no troops, cannot supply them or take any steps to put the country in a posture of war, except as Congress agrees to delegate such powers to him. Nor is it, I think, the practice of any democratic country that the executive should have such powers. It would be an anomalous situation if he might terminate rules which Congress had prescribed but which he could not initiate. That he might decline to use his powers is true enough, but the plaintiffs here need more than that; they must assert that he may alone absolve citizens

from a rule laid down by Congress, because in his judgment it is no longer necessary. I cannot help thinking that this is exactly parallel with a dispensing power.

Finally, it is urged that even though the war powers extend so far, they are still subject to constitutional limitations, among them to the Fifth Amendment, *ex parte Milligan*, supra. That position would be entirely answered by *Mugler* v. *Kansas*, 123 U. S. 623, even were the prohibition permanent. The language in the Fifth Amendment must mean what it does in the Fourteenth, and that is not a wrongful taking of property at the hands of Congress, which is not at those of a State. But this prohibition is not permanent, since it will end when peace is declared. That the plaintiffs in the first case will lose their whisky by mere delay cannot be. The plaintiff in the second case will indeed be unable meanwhile to make anything but one-half of one per cent. beer, which it says it cannot sell, and that is a genuine financial injury, but it does not result in the taking of its brewery, though the time be reckoned in months. As to its existing beer, it may be abolished at once, even though at a loss, or, for all that appears, it may keep under refrigeration till peace is declared.

The real sting of the law arises from the incidence of the Eighteenth Amendment on January sixteenth, 1920, for it may indeed come true that there will be no interval during which existing stocks of liquors may be sold. Yet I cannot say that it is the War Time Prohibition Act which produces that result. Its validity must depend upon its effect, and its effect is only to stop the sale of intoxicants for a time. If the Eighteenth

Amendment meanwhile gives a coup de grace to the industry, the death lies at its door. That is at least a complete answer to the plaintiff's claim in the second case that its brewery will be destroyed. If it be thought too formal and unreal an answer as to the existing stocks of liquor or of beer, since the days for sale may be altogether taken away, I can only answer that it does not yet appear that there will be none such or how many they will be. No one can say when peace will be declared; in the case of Germany it would surely be wrong to dispose of the case upon the theory that there would be no reasonable interval. In the case of Austria, whatever the probabilities, they are not such as allow of any certain determination. It may indeed be that in the end the plaintiffs will never be able to dispose of their stocks in the United States. Whatever justice there be in compensating them for their loss, it is not such that courts will make it a condition upon the validity of the law.

I hold, therefore, that the War Time Prohibition Act still remains a valid exercise of Congressional power, and the only question left is of Title I of the National Prohibition Act, in so far as it includes what on this record I must accept to be non-intoxicating beer. As to that I can say little more than that the power to include it falls squarely within the rule of *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, and the earlier case of *Silz* v. *Hesterberg*, 211 U. S. 31. Though the sole justification of the War Time Prohibition Act be to prohibit the sale of intoxicants, it may be impossible effectively to accomplish that end without including all kinds of beer. The same

rule must apply to Congress as to a State legislature.

Judge Brown in the case of *Narragansett Brewing Co.* v. *Baker & Shaunessy,* decided November 12, 1919, has held that the year granted by the Eighteenth Amendment positively accords that period during which no prohibition legislation can be enacted. It would follow of course that, had active hostilities continued through the year 1919, Congress would have been unable to prevent any sale of intoxicants at all. I should suppose that consistently the argument must apply to sales in the neighborhood of cantonments, though that would perhaps have been too strong a position to assert. With deference, it appears to me that the Eighteenth Amendment in giving a year's grace did not intrude upon the existing powers of Congress, whatever they were, any more than it intruded upon the powers of the States to regulate traffic in intoxicants domestically. The year was free, so far as the Amendment itself prohibited the business, but it left Congress in untramelled possession of its power to wage war.

Finally, the plaintiff in the second case says that even though I conclude, as I do, that the laws are constitutional, it should have a temporary injunction pending appeal. The Supreme Court is to hear argument upon the constitutionality of the War Time Prohibition Act on Thursday next, and it is reasonable to suppose that an early decision will be reached. The damage done by an injunction meanwhile cannot be measured in money, as in the case of *Cotting* v. *Kansas City Stock Yards,* 82 Fed. R. 857. Here is a question of national public policy of allowing the sale of

what the constituted authorities apparently regard as injurious to the public or to so much of it as they have the right to consider. To annul their will, if only for a season, is to do an injury which is, to say the least, as irreparable, if the laws be valid, as to prevent the plaintiffs from selling intoxicants for the same period, if they are not. In all the books we are told that to declare a statute unconstitutional we must be assured beyond question that it is such. A temporary stay now is a declaration for a time that it is unconstitutional; it is to dispense with the statute till the case be finally decided. Assuming that I may do so, there seems to be no proper reason for exercising the power.

The motions for preliminary injunction will be denied and the bills dismissed.

I am advised that Judge Knox now has pending before him a demurrer to an information filed against Thomas F. O'Brien and Patrick McEnery under the War Time Prohibition Act and the National Prohibition Act, in which demurrer the validity of said acts, upon constitutional grounds, is attacked. I am authorized by Judge Knox to say that he agrees with the conclusions which I have reached, and overrules the demurrer for that reason.

November 14, 1919.

FILED
NOV 20 1919
JAMES D. MAHER,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 603.

JACOB RUPPERT, a corporation,

Appellant,

against

FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and RICHARD J. MCELLIGOTT, Acting and Deputy Collector of Internal Revenue of the Third District of New York,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL POINT AS TO THE PROPER INTERPRETATION OF THE ACT OF CONGRESS OF NOVEMBER 21, 1918.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
WILLIAM L. MARBURY,
Of counsel for complainant-appellant.

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JACOB RUPPERT, a corporation,

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FRANCIS G. CAFFEY, United States Attorney for the Southern District of New York, and RICHARD J. MCELLIGOTT, Acting and Deputy Collector of Internal Revenue of the Third District of New York,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL POINT AS TO THE PROPER INTERPRETATION OF THE ACT OF CONGRESS OF NOVEMBER 21, 1918.

The question of statutory interpretation presented for adjudication under the act of Congress of November 21, 1918, is whether Congress, by use of the phrase "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes," intended to include non-intoxicating beer and wine. On the one hand, the contention of the Government is that the words "beer" and "wine" must be interpreted without relation to what follows, as including all beer whether or not intoxicating, and that they must be given effect as if they stood alone and not immediately followed by the phrase "or other intoxicating malt or

vinous liquor." The result of this interpretation necessarily would be that the word "other" would be wholly disregarded and ignored and the clause interpreted and enforced as if it read in each instance—

> "beer, wine, or intoxicating malt or vinous liquor for beverage purposes."

On the other hand, the contention of the appellant is that the word "other" must, if possible, be given significance and effect, and that, as it may be accorded an apt and sensible purpose, it cannot be ignored or disregarded.

Under the appellant's interpretation the word "other" serves to carry back and apply the defining or qualifying term "intoxicating" to the immediately preceding antecedent words "beer" and "wine," and to mark them with the common quality thus indicated, thereby importing that each must be "intoxicating," and the existence of that quality would, therefore, be an essential element of the crime. In other words, the appellant contends that, according to a settled rule of statutory interpretation, effect must, if possible, be accorded to every word in a statute, and that the word "other" cannot be treated as superfluous, void or insignificant, but that its use must be assumed to indicate a purpose on the part of Congress to qualify the words "beer" and "wine" immediately preceding, so that they should connote "intoxicating beer" and "intoxicating wine," respectively, and not "beer" and "wine" whether or not intoxicating. This settled rule of interpretation is stated in the case of *Market Co.* v. *Hoffman*, 101 U. S. 112, 115, by Mr. Justice Strong, speaking for the court, in the following language:

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

See also to same effect *United States* v. *Lexington Mill Co.*, 232 U. S. 399, 410.

It must, indeed, be manifest that no significance or effect can be given to the word "other" in the statutory clauses now before the court for interpretation except by holding that it indicates an intent or purpose on the part of Congress to affix the quality of "intoxicating" to the preceding words "beer" and "wine" and to require each of them to have that common quality as an essential element of the crime created by the statute.

If Congress intended to prohibit beers and wines whether or not intoxicating, it would clearly not have employed the word "other," and would have made the clauses read either:

> "beer, wine, or intoxicating malt or vinous liquor for beverage purposes,"

or more concisely but to the same effect:

> "all malt and vinous liquor for beverage purposes."

But as Congress was dealing only with the subject of intoxicating liquors, it qualified or defined the words "beer" and "wine" by connecting the defining word

"intoxicating" with the two words immediately preceding, through and by the use of the relative adjective "other." Thus, instead of using the expression "intoxicating beer and wine or other intoxicating malt or vinous liquor," it adopted the simpler and equally expressive and comprehensive form "beer, wine, or *other intoxicating* malt or vinous liquor," although the briefer mode of expressing such an intent might well have been "all intoxicating malt or vinous liquor."

There mere fact that under the appellant's interpretation the words "beer" and "wine" would not serve any distinct and separate purpose that would not be comprehended within the phrase "intoxicating malt or vinous liquor" would not warrant the disregard of the word "other." The use of unnecessary words has long been quite common in statutes and even constitutions (*United States* v. *Bassett*, 2 Story 389, 404, 24 Fed. Cas. No. 14,539). In *United States* v. *Fisher*, 2 Cranch 358, 387, Chief Justice Marshall, discussing somewhat analogous phraseology, said:

> "On the phraseology of this act it has been observed, that there is a circuity of expression, which would not have been used if the intention of the legislature had been to establish its priority in all cases whatever. Instead of saying 'any revenue officer, or other person hereafter becoming indebted to the United States,' the natural mode of expressing such an intent would have been, 'any person indebted to the United States'; and hence it has been inferred that debtors of a particular description only were in the mind of the legislature.
>
> "It is true the mode of expression which has been suggested, is at least as appropriate as that which has been used; but between the two there is no differ-

> ence of meaning, and it cannot be pretended that the natural sense of words is to be disregarded, because that which they import might have been better, or more directly expressed."

The case of *United States* v. *Chase*, 135 U. S. 255, directly rules the point of statutory interpretation that, in such a form of phrasing as is now presented for interpretation, the word "other" must be interpreted as urged by the appellant. In that case the court was called upon to interpret the act of Congress of July 12, 1876, 19 Stat. 90, which prohibited the use of mails for "every obscene, lewd, or lascivious book, pamphlet, picture, *paper, writing*, print or *other publication* of an indecent character." The indictment charged the sending of a *sealed* and addressed letter of an indecent character through the mails. Among the questions presented for decision was whether the words "or other publication" qualified and defined the preceding words "paper" and "writing" and marked each with the common quality of "publication" as an essential element of the crime, and thus excluded sealed private letters not in fact published. It was held that, according to a well-defined rule of construction, the words "other publication" related back and qualified or defined the words preceding them, and, consequently, that only "published papers" and "published writings" were within the statute. Mr. Justice Lamar delivering the unanimous opinion of the court, among other things, said (pp. 258, 259):

> "In the statute under consideration, the word 'writing' is used as one of a group or class of words, —book, pamphlet, picture, paper, writing, print,— each of which is ordinarily and *prima facie* under-

stood to be a publication; and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and marks each with the common quality indicated.

"It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written."

The earlier case of *United States* v. *Loftis*, 12 Fed. 671, likewise arose under the act of Congress of July 12, 1876, and presented a question similar to that before this court in the *Chase* case. In a ruling to the same effect, District Judge Deady reasoned as follows (p. 673):

"Speaking generally, this letter is a writing; but to bring it within this clause of the statute it must be also a 'publication.' This word 'writing' occurs in an enumeration of things—books, pamphlets, pictures, prints, and papers—which *ex vi termini* are *prima facie* publications.

"The general phrase with which the enumeration ends, 'or other publication of an indecent character,' impliedly asserts that the things before enumerated are publications. The expression 'John and James and other men' is one in which, by a necessary implication, it is asserted that John and James are men."

After the *Chase* case arose, but prior to its decision by this court, the act of Congress of July 12, 1876, was amended by the act of September 26, 1888 (25 Stat. 496, c. 1039), so as to insert the word "*letter*" in the list of prohibited publications and add the provision "*whether sealed as first-class matter or not.*" It was thereupon held that the statute as amended applied to the mailing of a private sealed letter. *Grimm* v. *United States*, 156

U. S. 604, and *Andrews* v. *United States,* 162 U. S. 420. Whilst in neither of these cases, nor in most of those decided in the District Courts arising under the act of 1888, is any reference made to the phrase "*whether sealed as first-class matter or not,*" * such amendment could not have been disregarded and undoubtedly was made by Congress for the purpose of declaring that sealed as well as unsealed letters should be deemed publications within the meaning of the statute as amended.

In *United States* v. *United Verde Copper Co.,* 196 U. S. 207, the court interpreted a provision of the act of Congress of June 3, 1878, 20 Stat. 88, c. 150, permitting the use of timber on the public lands for "building, agricultural, mining and other domestic purposes," and it was called upon to decide whether or not the word "other" could be disregarded and the statute made to read as if that word had not been used; in other words, whether the adjective phrase "other domestic" qualified the preceding words. Mr. Justice McKenna delivering the opinion of the court among other things said (at p. 213):

> "Counsel for the Government recognizes this, and substitutes for 'domestic' the word 'household' and contends that the word 'other' should be treated as an intruder and eliminated from the statute, and making the latter read that timber may be felled for 'building, agricultural, mining or *domestic* purposes.' But we are not permitted to take such liberty with the statute, if 'domestic' has a meaning consistent with the intentional use of the word 'other.' It has such meaning. It may relate, it is true, to the household. But, keeping its idea of locality, it may relate to a broader entity than the household. We may properly and accurately speak of domestic manufac-

* See, however, *United States* v. *Nathan,* 61 Fed. 936, at p. 937.

> tures, meaning not those of the household, but those of a county, state or nation, according to the object in contemplation. So in the statute the word 'domestic' applies to the locality to which the statute is directed, and gives permission to the industries there practised to use the public timber. This definition of 'domestic' gives the word an apt and sensible meaning and we must regard the association of the word 'other' with it as designed, not as accidental."

It is evident that this court then interpreted the word "other" in the act of 1878 as designedly used to connect the defining term "domestic" with the preceding words, including the word "mining," and held that, so interpreted, the intent of the statute was to authorize the use of timber for the purpose of "domestic mining." The syllabus of the report states the substance of the decision as follows:

> "An apt and sensible meaning must be given to words as they are used in a statute and the association of words must be regarded as designed and not as accidental, nor will a word be considered an intruder if the statute can be construed reasonably without eliminating that word."

In *Potts* v. *United States*, 114 Fed. 52, the Circuit Court of Appeals for the Ninth Circuit had before it for interpretation the act of Congress, 23 Stat. 321, providing "that no person, by force, threats, intimidations, or by any fencing or inclosing, *or any other unlawful means*, shall prevent or obstruct" any person from peaceably entering upon or establishing a settlement upon public lands. Speaking for the court, Circuit Judge Morrow used the following language (at p. 54):

> "By a well-known rule of construction the words 'or any other unlawful means,' in describing and giving scope to the prohibited acts, relate back to

> and qualify the preceding words 'fencing' and 'inclosing,' so that those words must be read as 'unlawful fencing' and 'unlawful inclosing.' "

In *Gridley* v. *Northwestern Mutual Life Ins. Co.*, 14 Blatchf. 107, 108, affirmed 100 U. S. 614, an insured was asked the question: "Have [your] parents, uncles, aunts, brothers or sisters been afflicted with consumption, . . . insanity, . . . or any other hereditary disease?" to which he replied: "No hereditary taint of any kind in family." The company claimed that an uncle of the insured had had insanity, but failed to prove that the insanity was hereditary. The court held that the defense was insufficient on that account; in other words, it was held that the word "other" in the phrase "or any *other* hereditary disease" carried back the term "hereditary" and thereby qualified each of the preceding nouns, District Judge Benedict saying:

> "It may be that the diseases enumerated in the question are not in all cases hereditary, but all of them sometimes take the form of hereditary diseases; and the word 'other' to my mind, plainly indicates that the question was intended to be an inquiry whether any of the diseases mentioned had appeared among the relatives of the applicant in the form of an hereditary disease."

This court affirmed the above interpretation and held that it was necessary to show not only that the alleged insanity of the uncle had existed, but that it was hereditary. See also to the same effect, *Sinclair* v. *Phœnix Mut. L. Ins. Co.*, 22 Fed. Cas. 195.

It is, therefore, proper to assume that when Congress used the phrase "beer, wine, or *other intoxicating* malt or vinous liquor," it knew that, according to a well-de-

fined rule of construction, the words "other intoxicating" would operate to mark the words "beer" and "wine" with the common quality of being "*intoxicating*"; and it must reasonably follow that such is the intention to be attributed to the lawmakers.

There are adjudications in the state courts to the same effect. In *City of Bowling Green* v. *McMullen*, 122 S. W. 823, 825, the Court of Appeals of Kentucky declared that a non-intoxicating malt liquor did not come within the meaning of a statute relating to "spirituous, vinous, malt or other intoxicating liquors." In *State* v. *Virgo*, 14 N. Dak. 293, 295, it was held that an act covering "all spirituous, malt, vinous, fermented or other intoxicating liquors," affected only liquors which were actually intoxicating and no others. And in *People* v. *Strickler*, 142 Pac. 1121, 1123 (Cal.), it was adjudged, in respect of a statute providing that "the term alcoholic liquors . . . shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contains 1 per cent. by volume, or more, of alcohol," that the final words, "any other liquor or mixture of liquors which contains 1 per cent. by volume, or more, of alcohol," related back to and qualified the particular words preceding them, so that no malt liquor with less than one per cent. of alcohol came within the prohibition, the court refusing to approve the argument that "by the specific enumeration in said section of spirituous, vinous and malt liquors, the legislature intended such liquors to fall under its ban regardless of whether they do or do not contain alcohol."

In a number of the authorities ordinarily cited in opposition to these views, the result is to be explained by dif-

ference in language or the history of the legislation. Thus, in the case of *United States* v. *Cohn,* 2 Ind. Ter. 474, 52 S. W. 38, it was the legislative history of the enactment that was determinative. In the prior statute "ale and beer" had been absolutely prohibited, and, as the court observed, it was the evident intent of the subsequent revision "to include in the new law that which was excluded by the old," not to omit what was included in the old. It should, furthermore, be noted that the decision was by a divided court, and that neither counsel nor the judges cited the *Chase* case or, so far as appears, even knew of it.

Moreover, the double disjunctive in the statute in the *Cohn* case—"vinous, malt *or* fermented liquors, *or* any other intoxicating drinks"—prevented that compactness of expression and unity of thought which are to be found in the statute now before the court. This is likewise true of the statute in *Fuller* v. *City of Jackson,* 97 Miss. 237, where the use of several disjunctives operated to break the sentence up into distinct and independent parts covering distinct classes of liquors.

In the case of *La Follette* v. *Murray,* 81 Oh. St. 474, the legislative history, and not the statutory language involved, was the *ratio decidendi.* The statute there laid a tax "upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors." In the prior act the word "any" had stood where the word "other" now was. The court held, upon consideration of the legislative history of the law, that the legislature had intended no change in effect by substituting "other" for "any." Similar considerations are applicable to *Marks*

v. *The State*, 159 Ala. 71, 48 So. 864, and *State* v. *Ely*, 22 S. Dak. 487.

The *Marks* case, moreover, involved, a statute quite different in important particulars from the one here under discussion. It prohibited the sale of "alcoholic, spirituous, vinous *or* malt liquors, intoxicating bitters *or* beverages *or other* liquors or beverages by whatsoever name called, which if drunk to excess will produce intoxication." It will be observed that no qualifying or defining adjective is placed between the word "other" and the word "liquors" in this act as in the act of November 21, 1918, and that the form of the clause is not a compact unity, but is broken into several independent parts by the repeated use of the disjunctive "or." The word "other" is not defined or qualified, but is used in the sense of additional and an apt and sensible meaning is accorded to it by recognizing that the preceding enumerated substances are "liquors or beverages," and it was not, therefore, necessary to hold that the phrase, "which if drunk to excess will produce intoxication," following the words "liquors or beverages," modified any terms but those nearest to them. In the act of November 21, 1918, however, the adjective "other" necessarily relates back to the preceding words as qualifying them, and, if it is to have any effect or significance, it must serve to connect the defining or qualifying word "intoxicating" with the preceding words "beer" and "wine." The interpretation of such a statute as that involved in the *Marks* case furnishes no precedent for the present case. A similar distinction applies to the cases of *Fuller* v. *City of Jackson*, 97 Miss. 237, 253; *Extract & Tonic Co.* v.

Lynch, 100 Miss. 650, and *in re Lockman*, 18 Idaho 465.*

In *Brown* v. *State*, 17 Ariz. 314, the statute related to "ardent spirits, ale, beer, wine, or intoxicating liquor of any kind." The word "other" was not employed. Manifestly that decision has no bearing at all upon the question now presented. The same is true of *Pennell* v. *State*, 141 Wis. 35, 123 N. W. 115, and *Leisy Brewing Co.* v. *Atchison &c. R. Co.*, 225 Fed. 753.

Aside, however, from the import of the words of the clause in question when read in the light of settled rules of statutory interpretation and current use of language, the declared purpose of the enactment as a war measure and the context of the words in question furnish evidence that it was the intention of Congress to prohibit only intoxicating liquors by the so-called "prohibition rider" annexed to the agricultural appropriation bill which became the act of November 21, 1918. The title of the act affords us no aid. It reads, 40 Stat. 1045:

> "An act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled 'An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products,' and for other purposes."

The prime object of the statute and the only purpose

* In this case the statute covered "spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, *including* bitters and other drinks that may be used as a beverage and produce intoxication." The use of the word "including" before "other drinks" etc. indicated that the clause immediately following that word was not used for the purpose of limiting or modifying what preceded it, but rather to add to the classes of beverages to be affected by the statute.

declared in its text are stated on the face of the statute as follows:

> "for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy."

The conservation of food products was already fully covered by the act of August 10, 1917, and the Presidential Proclamations of December 8, 1917, and September 16, 1918, issued thereunder, all then still in full force and effect.

It must be evident that whilst the conservation of man-power or increase of efficiency in production of supplies for the army and navy might be promoted by prohibiting the manufacture and sale of intoxicating liquors, such conservation would not be promoted or efficiency in production increased by prohibiting non-intoxicating liquors. Undoubtedly it was appreciated by Congress, as stated by District Judge Augustus N. Hand in his opinion in the New York cases (259 Fed. p. 332), that the great increase of production of grains and other food products which had occurred by the autumn of 1918 would induce or compel the President to relax the ban placed thereon by him under the act of August 10, 1917, and Congress intended that, no matter how abundant the supply of food products might be or become, the manufacture and sale of intoxicating beverages should be prohibited in order to conserve man-power as well as to increase efficiency of production.

Moreover, the assumption that the prohibition contained in the act of Congress was intended to be directed

only against intoxicating liquors would render all its provisions consistent and logical, whilst the contrary assumption that it was directed likewise against non-intoxicants would create plain inconsistencies and incongruities. Thus, it is difficult to imagine any sensible purpose in a prohibition of non-intoxicating beer whilst not prohibiting other well-known non-intoxicating malt liquors, such as non-intoxicating ale, stout and porter, particularly in view of the fact that Congress had for more than half a century treated ale and porter as well as lager beer as contradistinguished from beer and not covered by that term. For example, in the Revenue Act of July 13, 1866, 14 Stat. 164, sec. 48, taxable malt liquors were described as

> "beer, lager beer, ale, porter, or other similar fermented liquor by whatever name such liquor may be called,"

and this form of expressing the statutory intent has been continued for over fifty years. The Revenue Act of October 3, 1917, 40 Stat. 311, sec. 307, reads as follows:

> "beer, lager beer, ale, porter and other similar fermented liquors containing one-half per centum or more of alcohol. . . . "

The Revenue Act of 1918, approved February 24, 1919, 40 Stat. 1109, reads substantially the same, viz.:

> "beer, lager beer, ale, porter, and other similar fermented liquor, containing one-half of one per centum, or more, of alcohol, brewed or manufactured and hereafter sold."

Similar differentiation between beer on the one hand and ale and porter on the other will be found in the prohibition legislation of Congress relating to Alaska and

the District of Columbia respectively (Acts of February 14, 1917, and March 3, 1917; 39 Stat. 903, 1123), where the phrasing is

> "ale, porter, beer . . . and all malt liquors, and all other alcoholic liquors."

If, however, the interpretation is accepted that only intoxicating beers were intended to be prohibited, the inconsistency of prohibiting non-intoxicating beer whilst permitting non-intoxicating ale, stout and porter, if not lager beer, is entirely obviated. As District Judge Hand declared in his opinion (259 Fed. at p. 333):

> "Any other interpretation of the Act, not only does violence to the natural meaning of the words, but is utterly inconsistent with the fact that malt liquors such as ale, stout and porter are by no possibility prohibited unless they are intoxicating. To single out non-intoxicating beer for prohibition and leave non-intoxicating ale, stout, and porter to be manufactured and sold, would involve a construction of the Act too unreasonable to be entertained."

The other provisions of the prohibition rider inserted in the act of November 21, 1918, indicate that Congress was dealing throughout with the distinct mischief of intoxicating liquors used for beverage purposes and not with non-intoxicating beverages.

Immediately following the prohibition of "distilled spirits," which are always and indisputably intoxicating, and of "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes," is the prohibition of the importation into the United States of "distilled, malt, vinous, or other intoxicating liquors." This comprehensive phrase is certainly confined to intoxicating liquors, although it could have been expressed by the shorter and

equally comprehensive or inclusive term of "intoxicating liquors." If it be said that this clause as to importations is different in construction and effect from the preceding clause and that Congress intended to prohibit the importation of intoxicating liquors only, the conclusion would be that Congress intended to permit the importation of non-intoxicating malt or vinous liquors whilst prohibiting the manufacture and sale thereof in the United States. It is not reasonable to assume that Congress had any such intention, and it is far more sensible to conclude that in both cases it was dealing with and prohibiting only intoxicating liquors.

That Congress was dealing only with intoxicating liquors is also shown by the proviso granting the President authority and power to establish zones in which the sale, manufacture, or distribution of intoxicating liquors might be prohibited, the wording of which is as follows:

> "*Provided*, that the President of the United States be and hereby is, authorized and empowered, at any time after the passage of this act, to establish zones of such size as he may deem advisable about coal mines, munition factories, shipbuilding plants, and such other plants for war material as may seem to him to require such action whenever in his opinion the creation of such zones is necessary to, or advisable in, the proper prosecution of the war, and that he is hereby authorized and empowered to prohibit the sale, manufacture, or distribution of intoxicating liquors in such zones, and that any violation of the President's regulations in this regard shall be punished by imprisonment for not more than one year, or by fine of not more than $1,000, or by both such fine and imprisonment."

If Congress had intended in and by the other provisions of the act to prohibit the manufacture, sale and

importation of non-intoxicating liquors and had deemed this necessary to or advisable in the proper prosecution of the war and the conservation of man-power or the increase of efficiency in production, it would naturally have made the prohibition in the zone territory commensurate with the prohibition of importation, which likewise went immediately into force and effect, and equally commensurate with the country-wide prohibition which would go into effect as to production on May first and as to sale on July first.

It was urged by the Government in the New York cases that the differences between the clauses of the act relating to importation and zone districts on the one hand, and those relating to the manufacture or production and sale of liquors on the other hand, were natural and necessary because the former would go into effect immediately and the latter not until the following May and July, respectively. But this explanation is by no means sound or persuasive. If the prohibition of non-intoxicating beverages was deemed necessary to or advisable in the proper prosecution of the war, so as to conserve man-power and increase efficiency in production, such objectionable beverages could not be kept out of the country too soon, nor withheld too early from the reach of those serving or working within the war production zones. District Judge Hand met the argument of the Government as follows (259 Fed. at p. 332):

> "Is it likely that Congress would fail to empower the President to prohibit all beer of every kind in these important zones, if it had thought it necessary in the earlier provisions of the Act to prevent subter-

fuge by excluding non-intoxicating beer? If the total prohibition of non-intoxicating malt liquors was essential after June 30th, it apparently was more vital in the interval between. Indeed, peace might be concluded and the army demobilized before any result would ensue which might be obtained by such an indirect aid in the suppression of alcoholic drinks as the prohibition of non-intoxicating liquors."

The final clause of the enactment is the following proviso:

> "*Provided further,* that nothing in this Act shall be construed to interfere with the power conferred upon the President by section fifteen of the food-control Act, approved August tenth, nineteen hundred and seventeen."

Congress must have appreciated that the act of November 21, 1918, could not be operative without in some degree interfering with and curtailing the power vested in the President under section 15 of the Food and Fuel Control Act of August 10, 1917; but it is impossible to construe the act as contended by the Government without taking from the President practically all the power vested in him by the prior act.

An analysis of section 15 of the Food Control Act will show that it prohibits (1) the use of food products in the production of distilled spirits and (2) the importation into the United States of any distilled spirits, and (3) that it grants power to the President only with respect to the use of food products "in the production of malt or vinous liquors for beverage purposes" and "the reduction of the alcoholic content of any such malt or vinous liquor." The act of November 21, 1918, continues unimpaired these absolute prohibitions against distilled

spirits, but it adds prohibitions against the manufacture and sale of malt and vinous liquors; and these latter prohibitions cannot possibly be effective or enforced without interfering with and curtailing the President's power under the Food Control Act of August 10, 1917.

If, however, the appellant's interpretation of the act of November 21, 1918, be adopted, the President's power under the Food and Fuel Control Act of August 10, 1917, would continue uninterfered with as to limitation, regulation, or prohibition of the use of food products in the production of non-intoxicating malt and vinous liquors and the reduction of the alcoholic content of any such liquors, whilst if the Government's interpretation be adopted, the President's power would be curtailed so as to apply, so far as related to malt liquors, only to non-intoxicating ale, stout and porter.

The President interpreted the act of November 21, 1918, in accordance with the appellant's contention by his Proclamations of January 30 and March 4, 1919, "to the extent of permitting the use of grain in the manufacture of beverages which are not intoxicating" and by amending the Proclamation of September 16, 1918, so as to limit its prohibition to intoxicating liquors. If the President had understood or been advised by the Attorney General that after May 1 he would have no power to authorize the manufacture of non-intoxicating malt liquors except ale, porter and stout, and that after that date grains or other food products could not be used in the manufacture of non-intoxicating malt liquors except non-intoxicating ale, porter and stout, it is inconceiv-

able that he would have used the general language "beverages which are not intoxicating" in the Proclamation of January 30, or have amended the prior Proclamation of September 16, 1918, so as to make its prohibition apply only to "intoxicating malt liquors for beverage purposes."

It is submitted that full force and effect can be accorded to the proviso above quoted only by holding that the President's power over the manufacture of non-intoxicating malt liquors including non-intoxicating beer was not to be interfered with, and that his power to limit, regulate, or prohibit the use of food products in the manufacture of non-intoxicating beverages was to continue unimpaired. Otherwise, the language of the proviso will have to be given a limited and narrow scope which it is highly improbable was ever contemplated by Congress. By giving the proviso the broadest practical effect and interpreting the prohibition in the body of the act to be limited to intoxicating liquors and hence intoxicating beer, we shall be reaching a conclusion much more reasonable and more likely to accord with the real intention of Congress than the interpretation suggested by the Government, which would narrow and confine the proviso solely to preserving the power of the President in respect only of non-intoxicating ale, porter and stout without any reason whatever for thus discriminating against beer.

CONCLUSION.

It is, therefore, submitted that the true interpretation of the act of Congress of November 21, 1918, is that it does not prohibit the production or sale of non-intoxicating beer such as is manufactured by the complainant-appellant.

New York, November 18, 1919.

ELIHU ROOT,
WILLIAM D. GUTHRIE,
WILLIAM L. MARBURY,
Of counsel for complainant-appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

JACOB RUPPERT, A CORPORATION, complainant-appellant,
v.
FRANCIS G. CAFFEY, UNITED STATES Attorney for the Southern District of New York, and Richard J. McElligott, acting deputy collector of Internal Revenue of the third district of New York, defendants-appellees. } No. 603.

APPEAL FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

This is an appeal by a New York brewing corporation engaged in the manufacture of beer containing more than one-half of one per cent of alcohol by volume, but alleged to be nonintoxicating, to restrain the defendants, as Federal officers, from enforcing the terms and provisions of the act of Congress of November 21, 1918, known as the War Prohibition Act, supplemented by the act of October 28, 1919, known as the National Prohibition Act. The claim is that the manufacture and sale of the appellant's

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beverage was not unlawful under the act of November 21, 1918; that the effect of the act of October 28, 1919, if that act is valid, will be to make it unlawful; that the new act is in this respect unconstitutional and if enforced by the defendants who are charged with its enforcement will irreparably damage the complainant and deprive it of its liberty or property without due process of law or just compensation.

RULING OF THE COURT BELOW.

The District Court sustained a motion to dismiss the bill for want of equity on its face, holding that both the acts in question were constitutional and valid.

STATUTES INVOLVED.

So far as material to this case, the act of November 21, 1918, 40 Stat., c. 212, pp. 1045, 1046, provided that "for the purpose of conserving the man power of the Nation and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy"—

> After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until

> the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. * * * Any person who violates any of the foregoing provisions shall be punished by imprisonment not exceeding one year, or by fine not exceeding $1,000, or by both such imprisonment and fine.

The act of October 28, 1919, provides that—

> The words "beer, wine, or other intoxicating malt or vinous liquors" in the War Prohibition Act shall be hereafter construed to mean any such beverages which contain one-half of 1 per centum or more of alcohol by volume.

THE OPPOSING CONTENTIONS.

The appellant contends that at the time the new act of Congress was passed and went into effect there was in the United States and there is now no war emergency or necessity which warranted any such prohibition of nonintoxicating beverages; that the fact of the existence of such a war emergency or necessity is a justiciable question not foreclosed by any express or implied declaration by Congress; that Congress was without power to prohibit the carrying on of the business of the complainant, and that the legislation if enforced would deprive the complainant of its liberty and property without due process of law or just compensation in violation of the Fifth Amendment of the Constitution of the United States

as well as of the reserved police powers of the several States under the Tenth Amendment. The further contention is made that the act of November 21, 1918, prohibited the manufacture and sale of only such beer as was, in fact, intoxicating, and that the construction put by the act of October 28, 1919, upon the language used in that act was new legislation and embraced in the prohibition, for the first time, such beverages as the appellant manufactured.

The Government contends that both the acts in question are valid and constitutional under the war powers of Congress; that the declaration of war is the emergency which brings into play the war powers of Congress; that this emergency was not removed by the signing of an armistice, but will remain as an existing fact until a treaty of peace is put into effect; that the regulation or prohibition of the sale and manufacture of intoxicating liquors or of the use of man power and food products in the manufacture of beverages, whether intoxicating or not, are matters which have a substantial relation to the object to be accomplished by a proper exertion of the war powers of Congress; that during the existence of a state of war the question of the necessity for a particular exertion of the war powers by the enactment of legislation dealing with the subjects above mentioned is not a justiciable question, but is one committed by the Constitution to the exclusive judgment and discretion of the lawmaking branch of the Government; that the power of Congress to have passed the Act of October 28, 1919, on November 21, 1918, is clear;

that the act of November 21, 1918, properly construed, prohibited, just as the act of October 28, 1919, does, beer containing as much as one-half of 1 per cent of alcohol; that if this was not true Congress had the same power to pass the later act when it was passed that it would have had when the earlier act was passed.

ARGUMENT.

The appellant seems to predicate its case not upon any claim that the act of November 21, 1918, was unconstitutional when passed, but that, on account of changed conditions, its enforcement has now become unconstitutional and that at the time the act of October 28, 1919, was passed the right of Congress to exert its war powers had ceased.

This case is to be heard at the same time that cause No. 589 is heard. The bill in that case was filed before the act of October 28, 1919, became effective. It was filed by a distiller and attacks the constitutionality of the act of November 21, 1918, in so far as it is now sought to be enforced. If powers exerted last November by the passage of legislation can now be enforced there can, of course, be no doubt of the power of Congress to pass similar legislation at this time. The constitutional questions involved in this case and No. 589 are, therefore, identical. The contentions of the Government, as above set out, are fully presented by the brief filed in cause No. 589, and it is not deemed necessary to now repeat these arguments. The arguments con-

tained in that brief are, therefore, submitted in support of the Government's contention in this case. It is insisted that neither of the acts in question is subject to any constitutional objection.

THE BEER DESCRIBED IN THE BILL WAS PROHIBITED BY THE ACT OF NOVEMBER 21, 1918, AS WELL AS BY THAT OF OCTOBER 28, 1919.

The proper construction of the act of November 21, 1918, has been the subject of controversy ever since its passage. The gravamen of the bill is that the appellant has on hand a large amount of beer which it claims has been lawfully manufactured since the passage of the act of November 21, 1918, and that the passage of the later act, if valid, cuts off its right to sell and thereby, in large measure, destroys the value of the same. Of course, if the manufacture of the beer was, in fact, unlawful, appellant is entitled to no consideration on this account. And the Government has insisted ever since that act became effective that it was unlawful.

The District Courts which have been called on to pass on the question have been about equally divided in opinion. The question first arose in New York, where this appellant and another undertook to enjoin the district attorney from enforcing the act. In these cases, District Judge Augustus N. Hand held that beer was not prohibited unless it was, in fact, intoxicating and granted the injunction. (259 Fed. Rep. 321.) On appeal the Circuit Court of Appeals reversed the judgment, holding the act constitutional and, therefore, the court without

jurisdiction to enjoin its enforcement upon a mere allegation that the district attorney was misconstruing the act, the judges, however, expressing the opinion that Judge Hand had properly construed the act. (259 Fed. Rep. 525.)

Judge Rose, at Baltimore, Md., in a case which is now No. 458 on the docket of this court, indicated that his own opinion was in accord with the contention of the Government, but felt that under the circumstances he should follow the opinion expressed by the circuit judges in New York. In his opinion, which is a part of the record in cause No. 458, he said:

> I have no doubt that everybody who in Congress voted for or against the statute, and practically everybody affected by it, supposed at the time it was enacted that it covered all beer containing any appreciable amount of alcohol. That view is not shaken by the critical analysis to which the statute has been subjected. The contemporaneous interpretation of what they were doing at the time by all who had any part in the doing is to my mind more persuasive than the most careful analysis made after the event. So holding, had this question come up four or five weeks ago I would have overruled the demurrer. I do not do so now because it is evident that in many minds there is much doubt as to what the statute does mean. It is a penal law, and it may not be so interpreted as to make punishable anything which it does not clearly forbid. I can not now say that it clearly forbids the making or sale of beer which is not intoxicating, because

> five of the judges of the second circuit have each expressed the opinion that it has no relation to anything which is not intoxicating. I have profound respect for their opinions, not only because they are judges, but because they are unusually able men. It is impossible for me to say that the construction they put upon the statute is not one which a reasonable man might put on it, even although it may not be the one that I should personally have put on it had I known nothing of their views. It is, moreover, very important that this act shall be uniformly construed and that it shall mean the same thing in Maryland as in New York. Moreover, the error committed in sustaining the demurrer can be much more speedily and conveniently corrected than the opposite mistake. I shall, therefore, sustain the demurrer. (Rec., pp. 5–6.)

In the case of *United States* v. *The Pittsburgh Brewing Company et al.* Judge Thomson, in the District Court at Pittsburgh, sustained the contention of the Government in a carefully prepared but unreported opinion, which is printed as an appendix to this brief.

Judge Dickinson, in the District Court at Philadelphia, Pa., while ruling that the question was one which should not be decided on demurrer, concluded his opinion with this statement:

> We find ourselves in accord with the ruling of Judge Thomson of the Western District of Pennsylvania. The only difference is that he has seen fit to overrule the demurrer now,

> and we do not see any occasion to make any formal ruling at this time. All that is really involved is a regulation of the burden of proof, and this, as we have said, is properly a trial ruling.

In the case of *United States* v. *Schmauder* District Judge Chatfield, of Brooklyn, N. Y., holding the District Court in Connecticut, likewise sustained the Government's contention, 258 Fed. Rep. 251.

In *United States* v. *Stenson Brewing Company* Circuit Judge Page, holding the District Court in Chicago, Ill., reviewed with great care the decisions of the various District Courts and the authorities bearing on the question, and reached the conclusion that the Government's construction of the act was correct. His opinion is also printed in the appendix to this brief.

On the other hand, the District Court in Louisiana, in a case which is now No. 474 on the docket of this court, the District Courts at Boston, Los Angeles, San Francisco, in Rhode Island, and perhaps one or two other jurisdictions have sustained the construction placed on the act by the brewers.

In view of this difference of opinion, the appellant in proceeding to manufacture and accumulate a stock of beer took its chances and can not complain if the Government's contention is correct. In other words, if the act of November 21, 1918, prohibited the manufacture of the beer in question it is now simply denied the right to sell that which it has unlawfully manufactured.

If Congress still has the right to exert its war powers, and if it is the judge of the extent to which, during a period of war, it is necessary to exert them, then it is unimportant whether the prohibition of this particular beer has been in force since November, 1918, or came into existence only with the passage of the act of October 28, 1919. But if the prohibition was contained in the earlier act, it can not be fairly claimed that the later act even imposes a hardship upon the appellant. If the Government's contention in this respect is correct, then the sale of this beer would have been unlawful if the act of October 28, 1919, had never been passed. And it is respectfully submitted that the later act does not broaden or extend the prohibition of the earlier act.

It must be remembered that this act was not passed under the ordinary governmental police powers, but under the special war powers of Congress. It is not *per se* a measure for the general promotion of temperance; but its primary purpose was the withdrawal of man power and foodstuffs from nonessential employment and their devotion to employment necessary for the successful conduct of the war. For this purpose and under this power Congress could prohibit the manufacture of nonintoxicating as well as intoxicating beverages. What was done was to place a ban upon certain beverages, whose well-known large production and consumption constituted a heavy drain upon both the labor and food resources of the country. Doubtless for this

reason, and also because they were regarded as injurious to man power, the manifest purpose was to class generally, as nonessential, alcoholic beverages. Accordingly, the act prohibits by name the best-known and most largely consumed beverages of this class, distilled spirits, beer, and wine, beverages which are generally recognized as more or less intoxicating. And to embrace other similar but less well-known beverages, there were added the general words "or other intoxicating malt or vinous liquors." It is now insisted, contrary to the Government's contention, that the word "intoxicating" relates back and modifies beer and wine as well as other unnamed liquors, so that only malt or vinous liquors which are in fact intoxicating are prohibited. Hence the contention is that to bring beer within the prohibition the Government must allege and prove that it is intoxicating.

An act of Congress must, if possible, be so construed as to give effect to every part. If it had been the intention of Congress to leave the jury in each case to determine whether a particular malt or vinous liquor is intoxicating and to prohibit only such as may be found in this way to be intoxicating, the use of the words "beer" and "wine" was idle. The object would have been accomplished by simply prohibiting "all intoxicating malt and vinous liquors." The only way to give any effect to these words is to say that whatever beverages come within the commonly understood meaning of beer and wine are prohibited, and the prohibition is then extended, by

general words, to other beverages which are similar to beer and wine with respect to being malt or vinous and also with respect to their alcoholic content or intoxicating qualities.

There were cogent reasons why Congress, if it desired the law to be effective, should not have left its prohibition to depend upon how a jury in each case would determine the intoxicating qualities of a particular beverage. The word "intoxicating" can scarcely be said to have a very definite meaning. It is ordinarily defined to mean:

> Producing intoxication or feelings like those of intoxication; exhilarating; exciting, maddening, or stupefying with delight. (Standard Dictionary.)

But men will differ about what is exhilarating or exciting. One man will regard as intoxication what another will regard as too mildly exhilarating to be within that term. One expert, according to his standard of intoxication, will deem a given per cent of alcohol sufficient to render a beverage intoxicating while another will differ wholly from him. It is a well-known fact that what will make one man drunk will have no apparent effect upon another; and a drink which, at one time, may seem not to affect a man, may, at another time, make the same man drunk. A law whose enforcement depended upon the determination by juries of such a question would rest upon a most insecure foundation, and anything like a uniform administration of it would be impossible. Hence, the States in passing prohibition laws

have always enumerated by name the best known alcoholic or intoxicating liquors and added general language to include other similar beverages. Congress, in this act, has followed the same course. Beer usually is admittedly an intoxicating beverage and is so classed in the public mind, whether a particular quantity of it will make a particular man drunk or not. To say that the Government must prove in each case that the beer involved is, in fact, intoxicating would make the efficient enforcement almost, if not quite, impossible.

"Beer" without qualification is plainly prohibited unless the word "intoxicating" is made to relate back and modify it. It will be insisted that this modifying result is accomplished under the rule *ejusdem generis*. But to make this application of that rule is to give it a meaning exactly the opposite of that which it has. The rule is that *general words* which follow an enumeration, by words of a particular meaning, are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. We have here an enumeration of beer and wine by words of a particular and specific meaning, followed by the general words "or other intoxicating malt or vinous liquors." Under the rule referred to the meaning of these *general words* may take color from the words used in the enumeration which they follow. But there is no rule of construction under which words of a particular and specific meaning used in an enumeration are to

be given a different meaning by reason of general language following them and intended to describe other articles or persons. Thus, the words "other intoxicating" may be given a meaning reflected by the preceding words "beer" and "wine," and may be held to mean intoxicating in the general sense or to the extent that beer and wine are intoxicating or alcoholic. But certainly the word "beer" can not be taken in an unusual or strained sense by reason of any general language describing other liquors intended to be included. The rule in question leads to the conclusion that any malt or vinous liquor which is intoxicating in the sense that beer and wine are intoxicating is prohibited; but it can not be so applied as to exclude any beverage which would ordinarily be included under the word "beer." Clearly, the intention was to prohibit all beverages which are commonly known as beer. The courts of the various States have almost uniformly given this construction to similar language. (*United States* v. *Cohn*, 2 Ind. Terr. 474, 492, 501; *State* v. *Ely*, 22 S. Dak. 487, 492-3; *La Follette* v. *Murray*, 81 Ohio St. 474; *Fuller* v. *Jackson*, 97 Miss. 237, 253-6; *Extract & Tonic Co.* v. *Lynch*, 100 Miss. 650; *Marks* v. *State* (Ala.), 48 So. Rep. 864, 867; *In re Lockman*, 18 Idaho, 465, 469; *Brown* v. *State*, 17 Ariz. 314.)

Words used in a statute must be given their usual and ordinary meaning unless a contrary intention is expressed. No such intention having been expressed, the question is, What is the usual and ordinary meaning of the word "beer"? All the dictionaries define

it as an *alcoholic* beverage obtained by the fermentation of malt or certain other substances—Century Dictionary; Murray's New English Dictionary; Webster; Standard; Bouvier. But the word "intoxicating" appears in no definition. In common acceptation, therefore, beer is an alcoholic but not necessarily an intoxicating beverage. If it contains the usual ingredients of beer, including alcohol, a beverage is *beer* even though the quantity of alcohol is not sufficient to produce actual drunkenness. Nothing else appearing, it could be well said that such a beverage is beer if it contains any alcohol. But, when used by Congress, it has come to have a slightly different meaning. For years, a tax has been levied on "beer, lager beer, ale, porter, and other similar fermented liquors." Revised Statutes, secs. 3335–3339. From the first the Internal Revenue Department has ruled that the tax applied to all such beverages containing as much as one-half of one per cent of alcohol. Treasury Decisions 1307, 1360, 2354, 2370, and 2410. Manufacturers acquiesced and paid the tax. Such a beverage containing as much as one-half of one per cent of alcohol has, therefore, long ago come to be recognized both by the Government and the manufacturers as beer. And Congress has continued from time to time in revenue laws to use the same language and may well be said to have adopted the meaning placed upon it by the Government with the acquiescence of the manufacturers. Finally, in the revenue act of 1917, passed before the act now in question,

and the revenue act of 1918, passed later, Congress has expressly described beer as containing one-half of one per cent or more of alcohol and taxed similar beverages containing less as "soft drinks." It is clear, then, that when Congress used the word "beer" in the act of November 21, 1918, it used it in that sense.

CONCLUSION.

It is respectfully insisted that there is no merit in the bill and the decree of the District Court dismissing it should be affirmed.

Respectfully,

ALEX. C. KING,
Solicitor General.
WILLIAM L. FRIERSON,
Assistant Attorney General.

NOVEMBER, 1919.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA *v.* THE PITTSBURGH BREWING Company et al., Independent Brewing Company et al., and Daniel Olmstead.	Nos. 65, 66, and 67, May term, 1919.

RULING OF THE COURT.

THOMSON, *J.*:

We have here three informations, which were filed under Federal practice by leave of court, the first against the Pittsburgh Brewing Company and its officers, charging the illegal sale of ten barrels of beer; the second against Daniel Olmstead, charging the illegal sale of certain glasses of beer; and the third against the Independent Brewing Company, wherein it is charged, first, that the defendant illegally manufactured certain beer, and secondly, that they sold such beer after its manufacture.

The informations in each case aver that the beer in question contains as much as one-half of one per cent of alcohol, and also aver that the sales were made for beverage purposes. To these several informations the defendants have demurred, wherein they allege that the informations, respectively, are not sufficient in law, and particularly because the informations do not allege that the beer in question was intoxicating.

These informations were drawn under the act of Congress approved November 21, 1918, which is commonly known as the War Time Prohibition Act. The substance of the act, so far as it is material to these informations, provides that for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful after June 30, 1919, until the conclusion of the present war, and thereafter until the termination of demobilization, to use any grains, cereals, fruit, or other food product, in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. And after June 30, 1919, it shall be unlawful to sell distilled spirits or any beer, wine, or other intoxicating malt or vinous liquor for beverage purposes, except for export.

Congress was here clearly legislating with reference to certain intoxicating beverages, and among these they specified beer and wine. They must, of course, be presumed to have used these terms according to their usual and ordinary signification, as they were known in common use, well understood and well defined. Prior to the passage of this act, namely, February 6, 1919, the Commissioner of Internal Revenue promulgated certain regulations forbidding the brewing of beer on or after May 1, 1919, where the alcoholic content should exceed one-half of 1 per cent by volume, and forbidding the sale of beer after June 30, 1919, having a greater alcoholic content than one-half of 1 per cent by volume. On the same day the Treasury Department of the United States, by regulation or decision, interpreted the act of November 21, 1918, declaring "within the intent of the

act of November 21, 1918, a beverage containing one-half of 1 per cent or more of alcohol by volume will be regarded as intoxicating." While this is by no means conclusive of the legislative interpretation of the act in question, the Supreme Court of the United States has said that such interpretations are entitled to great weight. The important question raised by the several demurrers is: Is it necessary in the information to aver that the particular beer charged to have been unlawfully sold, is intoxicating? If an act of Congress prohibited the manufacture and sale of opium, morphine sulphate, and other poisonous narcotic drugs, this would be a legislative declaration that opium and morphine sulphate were narcotic and poisonous, and it would not be necessary in an information charging their illegal manufacture and sale, to charge that they were in fact narcotic and poisonous. It would not even be open to the defense either to aver or prove that these drugs were not narcotic or poisonous if in fact they were opium or morphine sulphate. They could only escape by showing that the drugs which they manufactured and sold, were in fact neither opium nor morphine sulphate.

So here, when Congress used the words "beer, wine and other intoxicating beverages," we have a legislative declaration that beer and wine are intoxicating beverages. This being true, it is not necessary in the information or indictment to aver their intoxicating character, because the legislature has so declared. The defendants may avoid on trial the effects of the statue by proof that the beverage which they sell is in fact neither beer, wine, nor spirits. We are dealing, therefore, here with a demurrer which, in the eye of the law admits for the

purposes of the argument, the truth of the facts set forth in the information, namely, that the defendants sold beer, that they sold it for beverage purposes, that it contained an alcoholic content of at least one-half of 1 per cent, and that it was not sold for export.

On this motion, therefore, I think the information sufficient and the demurrers must therefore be overruled, and they are accordingly overruled in each case, and the defendants are directed to plead.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA *v.* PITTSBURGH BREWING COMPANY et al., Independent Brewing Company et al., and Daniel Olmstead.	Nos. 65, 66, and 67, May term, 1919.

I hereby certify that the foregoing pages contain a true and correct transcript of the ruling of the court in the above-entitled cases, which came on to be heard on demurrer before Hon. W. H. S. Thomson, J., on Tuesday, July 15, 1919.

M. GANGWISCH.

JULY 15, 1919.

UNITED STATES *v.* STENSON BREWING COMPANY.

(Before Judge PAGE.)

CHICAGO, JULY 25, A. D. 1919.—TEN O'CLOCK, A. M.

Court convened pursuant to adjournment.

Counsel present: Mr. Clyne, and Mr. Glass for the United States; Mr. Levi Meyer, Mr. Freeman, and Mr. Alfred Austrian, for the defendant.

DECISION.

The COURT: Gentlemen, it had not been my intention to decide this Brewing Company case so early, but I took home the briefs and opinions and found that the authorities cited and which I would be under the necessity of examining were so numerous and of such character that I would not be able to have access to them where I am going, and I therefore concluded that the best thing to do was to dispose of it now.

To an information filed by the United States Government, charging a violation of the act of Congress of November 21, 1918, by the sale of beer containing an alcoholic content of as much as one-half of 1 per cent, the defendant filed a demurrer, which has been argued and considered by the court solely with reference to the interpretation of the following language: "no beer, wine, or other intoxicating malt or vinous liquor" in that act. It is contended by the defendant that the word "beer" means beer that is intoxicating because of the use of the words "other intoxicating," etc., immediately following, and that therefore the petition is defective because it does not say that intoxicating beer was sold.

The question has been very fully and ably presented, and in addition to the arguments of counsel before the court, briefs prepared upon the question here involved and upon other questions in cases in other jurisdictions have been submitted and carefully considered by the court.

For the reason that the opinions of other judges in other jurisdictions, dealing directly and indirectly with the question here involved, have been strongly urged upon the court as determinations that ought to be very persuasive with this court in passing upon the questions, I have gone fully into those cases in so far as they are available, and find that Judge Anderson, in the Massachusetts court, simply said:

> The Government admits that the word "intoxicating" was omitted from the information for the purpose of raising, as a question of law, the right to sell non-intoxicating liquor, commonly called "beer." I am perfectly clear that no such strained construction should be given to this statute.

No authorities are cited.

Judge Rose, in Maryland, cited no authorities, but said:

> Had this question come up four or five weeks ago, I would have overruled the demurrer. I do not do so now, because it is evident that in many minds there is much doubt as to what the statute does mean.

In Pennsylvania, Judge Thompson held as follows:

> When Congress used the words "beer, wine, and other intoxicating beverages," we have a legislative declaration that beer and wine are intoxicating beverages,

which was unfavorable to the contention of the Government in that case. Judge Thompson was strongly influenced by the regulation and decisions of the Treasury Department, because of the great weight which the Supreme Court of the United States said they are entitled to. No other authorities were cited.

In New York, in three separate equity proceedings brought by brewers against the acting collector of internal revenue and the United States district attorney, upon bills not involving the act of November 21, 1918, only, but seeking, as counsel said:

> Relief in equity to restrain the irreparable injury to and the destruction of their respective properties and business which would follow the enforcement against them of the terms of an act of Congress and certain presidential proclamations and regulations of the Department of Internal Revenue. They insist this statute and these proclamations are being misconstrued by the defendants, who are by law charged with their enforcement, and they further claim the statute is unconstitutional as construed by the defendants,

which will be found in the Root-Guthrie brief, pages 2 and 3. No answers were filed in the court below, and the cases were before the Court of Appeals, as counsel said:

> Upon the appeals of defendants from three orders or decrees of preliminary injunction. Prior to the decisions upon the motions for preliminary injunction, District Judge Augustus N. Hand had denied motions of the de-

> fendants made—to dismiss the respective bills of complaint therein. He wrote a carefully considered opinion.

Citing Root-Guthrie brief, pages 1 and 2.

So that when we come to consider the opinions in the United States Circuit Court of Appeals, it seems to me, they must be considered in the light of the fact that the only question before the court was the jurisdictional question on those preliminary injunction orders.

In the opinion of Judge Hand he considered at length the question of jurisdiction, which was simply the question of whether the Acting Collector of Internal Revenue and the United States district attorney could be controlled by the injunctional order of that court.

It is perfectly clear from the language on page 15 of Judge Hand's opinion that that part of the case was considered and decided by him because of the irreparable-injury allegations in the bill. He said:

> Moreover, this case is before the court on a bill which alleges that it is the threat of the United States attorney to enforce against "the complainant, its officers, agents, and servants, numbering more than seventy, the various pains and penalties, including fine and imprisonment and various forfeitures of property—all to the irreparable damage of the complainant and its stockholders, and which said injury and damage would be incapable of admeasurement and adjudication in an action at law."

> Certainly, if the prosecutions were instituted the damages would be irreparable and could not, so far as I am aware, be recovered in any form of legal action.

And on page 16 is a further finding which refers to what preceded and to other reasoning of the court:

> For the foregoing reasons I am satisfied that this suit is not against the United States and may be entertained against the United States attorney because it affects rights of property and that the complainant, if his contentions be sound on the merits, has no adequate remedy at law.
>
> Ample jurisdiction is shown over the acting collector of internal revenue. Not only does the original bill allege that his predecessor was threatening to enforce various pains and penalties, including forfeiture of property, but the supplemental bill alleges that he has refused to collect from brewers the stamps, and refused to issue these stamps which the act of February 24, 1919, requires shall be placed upon fermented liquor containing one-half per cent or more of alcohol.

Thereupon, after deciding the questions of jurisdiction, the court said:

> I come to a consideration of the merits and of the proper construction of the words in the act of November 21, 1918.

Inasmuch as the judges of the Court of Appeals only expressed their opinion upon the meaning of the words "no beer, wine, or other intoxicating malt or vinous liquor" because it was "desired that the judges express their opinion" thereon, it may be assumed, I think, that they did not consider that

the question of the correct or incorrect determination of the meaning of those words was before that court, or necessarily before the lower court.

While any opinion delivered by any judge upon a bench is entitled to serious consideration by every other judge, yet utterances upon matters not directly at issue or necessarily involved in the case are by no means binding or controlling upon a judge who is directly charged with the responsibility of judicial determination of a question at issue before him.

In the opinions filed in the Court of Appeals all that the majority opinion shows, with reference to the construction of the statute, is contained in the following words:

> Although we concur in the construction of the statute by the court below.

The majority opinion delivered by Judge Ward held, as to the district attorney:

> The order of the court below is modified by striking out the injunction pendente lite against him.

In this Judge Ward was supported by Judge Rogers. Judge Hough concurred in the opinion except that he dissented from the modification as to the Attorney General. He did not mention or discuss the words the construction of which is here asked.

Judge Rogers filed a dissenting opinion, and states as his opinion:

> that the bill should be dismissed not only as against the United States district attorney, but also against the Acting Collector of Internal Revenue

and he reached this conclusion after a very elaborate discussion of the jurisdictional question.

In Judge Rogers's expression of opinion as to the meaning of the words "no beer, wine, or other intoxicating malt, or vinous liquor," he said:

> I state my opinion. It is that the rule of construction, known as ejusdem generis, applies where general words follow the enumeration of a particular class of things, the general class will be construed as applicable to things of the same class as that enumerated.

He did not further discuss the matter or cite authorities.

I have gone very fully into the cases cited and relied upon by Judge Hand in his opinion upon the proper construction of the statutory words in question, and I have read many authorities cited in those cases and am of the opinion that, because of the contrariety of opinion expressed all but one or two of them are utterly hopeless as authorities and some of those are not useful in the decision of this case. For instance, in *Insurance Company* v. *Gridley*, 100 U. S. 614, the case was decided squarely, not by the interpretation of any words, because of their relation to each other, but on the question as to what was material or not material to the company in the questions asked.

The case mostly relied upon by the defendant is *United States* v. *Chase*, 135 U. S. 255. There was a statute passed in 1876, which was an amendment to an amended act of 1873, which was in itself an amendment to an act of 1872. Section I of the act of 1876 reads as follows:

> Every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character.

The question in that particular case was as to whether a "letter," whether it contained the elements of obscenity mentioned in the statute was within the statute. The court held that it was not, saying:

> In the statute under consideration, the word "writing" is used as one of a group or class of words—books, pamphlets, pictures, papers, writing, print—*each of which is ordinarily and prima facie understood to be a publication;* and the enumeration concludes with the general phrase "or other publication," which applies to all articles enumerated, and marks each with the common quality indicated.

The decision by Judge Hand, which I understand is the contention of the defendants with reference to this decision, is contained in the following words:

> The court held that according to a well-defined rule of construction, the words "and other publications" qualify the words preceding them so that only *published writings* and not unpublished private letters were within the act.

This, it seems to me, is an incorrect understanding of what the Supreme Court meant and it is not all that the Supreme Court said, as is perfectly apparent from Judge Hand's quotation at the bottom of page 23 of the actual language used by the Supreme Court in the *Chase* case. The controlling thing that the Supreme Court said was:

> Referring to the words "book, pamphlet," etc., *each of which is ordinarily and prima facie understood to be a publication.*

Without any reference to what follows, the Supreme Court said that prima facie the words "book, pamphlet," etc., were prima facie understood to mean a publication, and then as they were understood to mean a publication they held a private letter, although it was obscene, being unpublished, was not within the statute.

After the court used that language, it was a perfectly simple thing to say that the words "other publications" referred to publications of a similar kind and character to those indicated by the specific words.

That case has only been twice referred to by the Supreme Court and then not in such a way as to attach any importance to the concluding words "or other publications" which applies to all articles enumerated, and marks each with the common quality indicated, to which defendants here attach so much importance.

The reason therefor becomes perfectly obvious by the reading of the authorities, and they are very numerous, attempting to construe the same statute after it had been further amended, and to this I will refer later.

Counsel for defendant refers to the case of the *United States* v. *Loftis*, which was cited by Judge Hand. That case was decided in the district court of Oregon in 1892 by Judge Deady. The charge was for mailing a sealed letter in violation of section 3893. The court said:

> Speaking generally, this letter is a writing. But to bring it within this clause of the statute it must also be a "publication." This word "writing" occurs in an enumeration of things—books, pamphlets, etc.—which *ex vi termini* are prima facie publications.

> The general phrase with which the enumerations ends, "or other publication of an indecent character," impliedly asserts that the things before enumerated are publications. The expression "John and James and other men" is one in which, by a necessary implication, it is asserted that John and James are men.

I can not help wondering what would have been the interpretation if the expression relied upon by Judge Deady had not been "John and James and other men" but "John and Mary and other men," which is precisely the character of difficulty which Congress created a little later when it was attempted to prosecute a man who had sent through the mails an obscene letter which was private and sealed, with no extraneous marks on it.

Some of these cases are important because of the fact that in 1883 Judge Morrow, in California, sustained a demurrer on the ground that an obscene, private sealed letter was not within the prohibition of the statute. In the same volume a month or two later Judge Ross overruled a demurrer, in the same year, on the ground that such a letter was within the prohibition of the statute, after which the case of *Botts* v. *United States*, 114 Fed. 52, relied upon by the defendant, was decided by Judges Ross, Morrow, and Gilbert as the Circuit Court of Appeals for the Ninth Circuit.

In *Andrew* v. *United States*, 162 U. S. 423, the court, referring to the word "letter," that had created much trouble, said:

> Any doubt there may have been as to the proper meaning to be given to the word has been removed by the case above cited, of *Grimm* v. *United States*, 156 U. S. 602, where

mailing a private sealed envelope, in an envelope on which nothing appeared but the name and address, but containing obscene matter, was held to be an offense within the statute.

The inevitable consequence of that holding is to my mind either that the Supreme Court must have receded from its holding in the 135 U. S., or that it has held that Congress, by inserting the word "letter" between the two other words in the act, arbitrarily defined it to be a publication, and that it thereby became a publication, although it never was published.

This shows, however, that by slightly altering the circumstances the whole force of any decision, perfectly good in itself, may be lost.

There were a great number of cases, I should say 20 or more, under that statute by a great variety of district courts before the case in the 156 U. S. was decided, and the matter did not reach a final determination until the Supreme Court of the United States, in the 162d, said that the matter had been finally settled in the 156th.

I will not take time to refer to the results reached by the State courts in their decisions, because I have found, as Judge Hand said, "the results which the State courts have reached in interpreting their liquor laws, have been most divergent."

Judge Hand reached the conclusion that the rule of construction *ejusdem generis* applies here, and the contention is made here by the defendants that the act, as printed, should be construed to read the same as though the words, "beer, wine, or other" were eliminated. In other words, the construction arrived at would in effect be reached by reading out of the statute a considerable portion of the language used.

This, I do not think should be done, nor can it be properly done. One of the first principles of construction of any statute or contract is that effect shall be given, if possible, to every word in it.

It is a further rule of construction that words must be taken to have been used in their usual and ordinary sense. The word "Other," in statutes and contracts, has been so frequently used and has been given such a variety of construction and interpretation, that it is difficult to say what its meaning should be, except by having recourse in each case to the exact clause, sentence, act, or instrument in which it is used.

When the statute in question was enacted, 10 days after the signing of the armistice, the act of August 10, 1917, was in force. Section 10194 provided that:

> From and after 30 days from the approval of this act, no foods, fruits, food materials or feeds shall be used in the production of distilled spirits for beverage purposes. Whenever the President shall find that limitation, regulation or prohibition of the use of foods, fruits, food materials, or feeds in the production of malt or vinous liquors, for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquor, is essential, in order to assure an adequate and continuous supply of food, or that the national security and defense will be subserved thereby, he is authorized, from time to time, to prescribe and give public notice of the extent of the limitation, regulation, prohibition, or reduction so necessitated.

There was also in force a statute effective October , 1917, a little more than a year before the enact-ıent of the statute in question, which reads as ollows:

> That on and after the passage of this act there shall be levied and collected on all beer, lager beer, ale, porter, and other similar fermented liquors, containing one-half per centum or more of alcohol—an additional tax.

In the same act also is found section 5579 contain-ıg subdivisions A, B, and C. Under B, it is provided:

> Upon all unfermented grape juice, soft drinks, or artificial mineral waters (not carbonated), and fermented liquors containing less than one-half per centum of alcohol, sold by manufacturer, producer or importer thereof, in bottles or other closed containers, there shall be a tax.

From which it appears that in the sections men-ıoned, the words "beer, lager beer, ale, porter, and ther similar fermented liquors," were only applied ɔ those liquors named in the first section containing ne-half per centum or more of alcohol, and when ıey came to the taxation of liquor containing less ıan one-half per centum of alcohol, they simply eferred to them as unfermented liquors.

In the other section of the act relating to fer-ıented liquors, the word "beer" is repeatedly re-erred to and used as a distinctive manufactured rticle under that name.

Congress is presumed to have had the knowledge f all these matters and to have acted with reference

to them in so far as they were at all pertinent, in passing the act of November 21, 1918.

While it is true, as stated, that the armistice had then been signed, and while it is true that we know a good deal more about the situation now, with reference to men and food and the necessity for the enforcement of the provisions of the Act of November 21, 1918, than Congress then knew, yet the Act must be considered and construed in the light of conditions then existing as Congress knew them.

In the act it was said that after June 30, 1919, until the conclusion of the war and thereafter until the termination of demobilization, which must be determined and proclaimed by the President, that for the purpose of conserving the man power of the nation and increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits. After May 1, 1919, until the conclusion of the war and thereafter until the termination of demobilization, as above stated, it was provided—

> that no grains, cereals, fruits, or other food products shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes, and that after June 30, 1919, until the conclusion of the war and thereafter until the termination of demobilization, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export.

And again:

> After the approval of this act no distilled, malt, vinous, or other intoxicating liquor shall be imported into the United States during the continuance of the war and period of demobilization.

It is contended by the defendant that the purpose for which this legislation was enacted, which is conserving man power, increasing efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, was intended to be accomplished solely by preventing intemperance, by putting it beyond the power of man to buy intoxicating liquors, and it was not intended to conserve man power and increase efficiency by taking men out of the industry of manufacturing liquors, nor out of the carrying trade, the business of selling, or other connections with the sale of beer, wine, etc.

It seems to me this is too narrow a construction. It does not seem reasonable to me to think that Congress by the act only intended that conserving of man power and that inducement of efficiency by enforcing abstinence from the use of liquors, when it must be perfectly apparent to everybody that any liquors of the kind mentioned in the act, whatever the interpretation of the words may be, if they were to be sold, transported, and resold for consumption were to be manufactured and ships were to be used for the purpose of importing them, much man power would be used and that efficiency in the production of arms, etc., would be to that extent reduced.

It is a fact within the common knowledge of every one that general building operations and many other lines of business were practically brought to a standstill; that transportation, both by land and water, of many things necessary commercially and which were

needed in general use was abandoned either because of congressional enactments, orders of the War Board, or by common consent, because the man power, materials, and carrying facilities were needed for other purposes.

So, I assume that Congress meant more than to conserve man power and induce efficiency in the manner insisted upon by the defendant.

It seems to me to be a peculiar significance that in the first part of the act it was made unlawful to sell *distilled spirits* and that in the part referring to importation it was directed against *distilled, malt, vinous, or other intoxicating liquors*, and in the part referring to the prohibition against manufacturing after June 30, 1919, the language "no beer, wine, or other intoxicating malt or vinous liquor" was used, and in the language permitting zoning by the President, which could take effect immediately upon the passage of the act, the President was empowered to prohibit the sale, manufacture, or distribution of intoxicating liquors.

If the contention of the defendant is correct, then the language used with reference to prohibited importations means exactly the same as that language prohibiting the manufacture of beer, etc.—in other words, that Congress, in the same act, within a few lines of each other, used two almost wholly separate and different sets of words to express the same meaning.

This does not commend itself to me as a reasonable conclusion, and it seems to me also as a necessary consequence of defendant's contention, and I understand it is its contention, that the words "intoxicating liquors," used with reference to the President's zone powers, has the same meaning as the language with reference to the manufacture of beer.

A reading of the act will show that the power vested in the President to establish zones becomes available immediately upon the passage of the act, and that the prohibition against the manufacture of beer, wine, or other intoxicating malt or vinous liquor was postponed until nearly eight months after the above period.

There can be nothing whatever inconsistent in the two, no reason for construing one as having legitimately an influence upon the other.

I asked the question upon the hearing as to the reason for the postponement of the time of taking effect of this legislation. Counsel for defendant made an answer that I presume every one probably knew to be a fact, that Congress postponed the time of the taking effect of this prohibition against the manufacture of beer, etc., to enable the disposition of stocks already manufactured. It is within my recollection that some time before the passage of this act a circular was sent throughout the country urging reason why this action should be postponed, the reasons being there were a great many millions of liquor securities held by banks and other bonding institutions as security, and if that act went into effect at that time their security would have been greatly injured.

The principal dealings of the United States Government with spirituous and malt liquors seems to have been with reference to the collection of internal revenue. In section 3339, under Revised Statutes passed in 1866, it was provided:

> There shall be paid on all beer, lager beer, ale, porter, and other similar fermented liquors brewed or manufactured and sold, etc., a tax.

It early became necessary, in order to determine what came reasonably under that taxing power, just what was taxable, and the Government, through its Treasury and Internal Revenue Departments, proceeded to so define it by fixing the alcoholic content, which was made one-half of 1 per cent.

In 1908 the Commissioner of Internal Revenue said:

> While section 3339 of the Revised Statutes requires a payment of a tax of $1 per barrel on all beer, lager beer, ale, porter, and other similar fermented liquors, the administration of the law necessitates the fixing of a point below which the alcoholic content is too inconsiderable to class the beverage as either of the liquors enumerated above. The practice and rules of this office have already fixed this point as one-half of 1 per cent. It is, therefore, held that beverages containing no more than one-half of 1 per cent of alcohol by volume do not come within the consideration of the internal-revenue laws, either as to manufacture or sale.

As is said in the decision of Judge Hand, "The decisions of the Treasury Department are entitled to very great weight." Brewers paying the tax, the Congress of the United States, and everybody concerned in the United States Government, seem to have acquiesced in this definition of beer, lager beer, ale, porter, etc., so far as the alcoholic content is concerned, and it seems to me that so far as the alcoholic content of beer is concerned, as it appears in the laws of the United States, and not otherwise specifically defined, must be held to be a liquor, in the beer class, having an alcoholic content of not more than one-half of 1 per cent.

In fact, as I pointed out, Congress, in the act of October 3, 1917, 15 months before the passing of the act here in question, seems to have adopted the construction which the Treasury Department had long before placed upon it, and in the act of February 24, 1919, in section 608, Congress seems again to have adopted the construction.

I am of the opinion that Congress, in using the word "beer" in the act of November 21, 1918, had in mind that alcoholic content which the Treasury Department has for many years placed upon it and which has been acquiesced in by everybody.

What would be the effect upon the words "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes," if the construction contended for by defendant is adopted? That construction necessarily means that the words "beer, wine, or other," shall be eliminated in the reading of the act.

Counsel for defendant, while conceding that that is the effect of such construction, does not contend that the words "beer, wine, or other," should be ignored, but rather contends that under the authority of the decision of the Supreme Court it should be held that the word "intoxicating" qualifies the word "beer" or "wine."

If this is true, then the necessary conclusion is that Congress in the act has said that "beer and wine," as used in the act, are intoxicating, because, under that contention the words "other intoxicating malt or vinous liquor" could not refer back to a defined beer and wine on any other hypothesis save one, namely, that what Congress really intended to say was that "*no beer which is intoxicating and no wine which is intoxicating, or other intoxicating malt or vinous liquor, shall be sold for a beverage,*" etc.

I can see no possible ground upon which the court would be justified in reading into the act any such words.

If the 135 U. S. is really an authority which is controlling upon this court, then it seems to me that it is an authority when considered in connection with the case in 156 U. S. and 162 U. S., holding that Congress meant and intended to say in the act of November 21, 1918, that beer is intoxicating.

If the word "beer" as used in the act really means an intoxicating beverage, why, then, is it not sufficient for the Government to allege that the defendant has made beer in violation of the statute, without the necessity of alleging that it is intoxicating beer? Certainly if the use of the word "beer" in the statute means intoxicating beer, it ought not to be necessary for the Government to allege that fact.

I am not resting my decision upon that conclusion. My conclusion is that the beer meant by Congress in the passage of that act was beer which by its acts and by the Treasury Department had been defined for many years and accepted. My conclusion, therefore, is that the demurrer will have to be overruled.

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JACOB RUPPERT, A CORPORATION, *v.* CAFFEY, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 603. Argued November 20, 21, 1919.—Decided January 5, 1920.

The War-Time Prohibition Act was within the war power of Congress when passed and had neither become invalid by change of circumstances nor expired by its own terms when this suit was begun. P. 281. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *ante*, 146.

For the same reasons, Congress had power to enact new prohibitions at the time when the National Prohibition Act, *infra*, was passed. P. 282.

The National Prohibition Act (October 28, 1919, Title I, § 1) in its provision that "The words 'beer, wine, or other intoxicating malt or vinous liquors' in the War Prohibition Act shall be hereafter construed to mean any such beverages which contain one-half of 1 per centum or more of alcohol by volume," *held* constitutional. P. 282.

As a measure reasonably necessary to make the prohibition of intoxicating liquors effectual, Congress in the exercise of the war power may prohibit those containing as much as one-half of 1 per cent. by volume of alcohol, even though they be not in fact intoxicating. *Id.*

The argument that power to prohibit non-intoxicating liquors is merely an incident to the power to prohibit intoxicating liquors, implied from clause 18, § 8, of Art. I, of the Constitution, and cannot be upheld, because one implied power cannot be grafted upon another, is merely a matter of words, since, rightly understood, the power in question is a single, broad power, not merely to prohibit but to prevent the liquor traffic, like the police power of the States as applied to the same subject. P. 299.

Some confusion of thought might perhaps have been avoided, if, instead of distinguishing between powers by the term express and implied, the term specific and general had been used; for the power conferred by clause 18, § 8, of Art. I, "to make all laws which shall be necessary and proper for carrying into execution" powers specifically granted, is itself an express power. P. 300.

264. Argument for Appellant.

The fact that the above-cited provision of the National Prohibition Act entails peculiar hardship and loss to owners of breweries and manufactured beer by becoming effective immediately upon its passage, does not render it arbitrary and unreasonable. P. 301.

Such immediate prohibition did not amount to a taking of the non-intoxicating beer previously acquired, for which compensation must be made. P. 302.

The action of the President, under the Food Control Act, in at first permitting the production of malt liquors containing not more than 2.75 per cent. of alcohol, in next extending the prohibition to all malt liquors for beverage purposes irrespective of alcoholic content, and in afterwards limiting the prohibition to intoxicating malt liquors, *held*, not to import a finding that 2.75 per cent. beer is non-intoxicating or to raise any equity in favor of an owner of beer manufactured after the President's authority over the subject had ceased. P. 303.

Affirmed.

THE case is stated in the opinion.

Mr. Elihu Root and *Mr. William D. Guthrie*, with whom *Mr. William L. Marbury* was on the briefs, for appellant:

The war powers of the United States are complete and sufficient for all war purposes and comprehend the right to employ any appropriate means found necessary and proper for prosecuting a war and plainly adapted to that end. *Selective Draft Law Cases*, 245 U. S. 366, 377; *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, 149; *Salamandra Ins. Co.* v. *N. Y. Life Insurance & Trust Co.*, 254 Fed. Rep. 852, 858. Those powers, however, are clearly divided between Congress and the President. All the executive power exercisable in connection with the waging or conducting of war is vested exclusively in the President by virtue, not only of his office as President, but of his powers as Commander-in-chief. *Ex parte Milligan*, 4 Wall. 2, 139.

It may be conceded that whilst war was being actually waged between April, 1917, and November, 1918, and whilst the country continued on a war-footing with the army and navy not yet demobilized, Congress could, if

necessary and proper for the prosecution of the war while raging, or the support of the army and maintenance of the navy pending demobilization, prohibit the use and consumption of food products in the manufacture of beverages, whether or not intoxicating, and prohibit the manufacture, sale and use of intoxicating liquors. But it is urged that any such incidental war power of prohibition, which would necessarily interfere with the liberties and property rights of the people of the United States and the governmental powers reserved to the several States, can be exercised only in cases of existing war emergency or military necessity. In other words, the rights of the States cannot be even temporarily violated unless a war emergency reasonably warrants such action. This follows from the very nature of our federal system and the duty of Congress and the President not to violate the express reservations of powers to the States, embodied in the Tenth Amendment to the Constitution of the United States, or the constitutional rights of the individual. *Hammer* v. *Dagenhart*, 247 U. S. 251, 273, 276; *Keller* v. *United States*, 213 U. S. 138, 144; *Vance* v. *Vandercook Co.*, 170 U. S. 438, 444; *Kidd* v. *Pearson*, 128 U. S. 1, 24; *McCulloch* v. *Maryland*, 4 Wheat. 316, 405; *Houston* v. *Moore*, 5 Wheat. 1, 48.

The business of brewing beer is authorized, licensed and regulated in a number of the States, as in the State of New York, and any legislation of Congress prohibiting the manufacture and sale of beer must necessarily operate to override state policy and authority and state legislation, as well as to deprive many States of a present source of large revenue from taxation necessary for the support and maintenance of their respective state governments. In the State of New York alone, such annual revenue amounted in 1916 to over $21,000,000, in 1917 to over $20,700,000 and in 1918 to over $22,500,000.

Hundreds of millions of dollars are invested in the

brewing business and to many thousands of citizens it is their only means of livelihood. The rights of all engaged in such a business, heretofore always expressly authorized and licensed by both federal and state governments, ought not to be subject to selection for violation and destruction under the pretext of the exercise of the war powers of Congress at a time when no actual war emergency or military necessity calls for any such prohibition, and when no other class in the Nation is being subjected to any such prohibition or discrimination or called upon to make any such contribution or sacrifice to the common welfare on any plea whatever. On behalf of the brewers, whose property and business are now threatened with destruction long before the Eighteenth Amendment will become effective as the source of any additional power to Congress or as a limitation upon the reserved rights of the States and their peoples, it is submitted that the rights and liberties guaranteed by the Constitution are not suspended and do not cease to be effective guarantees during a period of war, and are not subject to denial or curtailment by war measures, whether by the Congress or the President, unless an actual war emergency or military necessity so requires, and then only during the period of such war emergency or military necessity. *Mitchell* v. *Harmony*, 13 How. 115, 149; *Ex parte Milligan*, 4 Wall. 2, 121; *Raymond* v. *Thomas*, 91 U. S. 712, 716.

It was undoubtedly the intention of the framers of the Constitution to vest in the President the broadest war powers, and to render him independent of Congress in respect of the exercise of those powers in the actual conduct of a war. Hamilton, The Federalist, No. 74, Ford's ed., p. 496; Kent's Comm., vol. 1, p. 282; Story on the Constitution, § 149; Pomeroy, Constitutional Law, §§ 703–714; Von Holst's Constitutional Law (Mason's translation), pp. 164, 192–195. His powers are here emphasized because he is peculiarly qualified under the Constitution

to determine such questions as the existence or continuance of a war emergency or military necessity, and his official declarations upon such a subject, in the absence of other criteria, furnish the best evidence which the nature of the case permits, and in the absence of all other evidence are conclusive.

The existence of a war emergency must be the basis and warrant for the exercise of an implied war power, which tends to deny the rights of an individual or a State, and the courts are not concluded by the mere declaration of Congress, whether express or implied, that such an emergency actually exists, or shall be presumed to continue for some indefinite period in the future. *Ex parte Milligan*, 4 Wall. 2; Willoughby, Constitutional Law, vol. 2, p. 1251.

The ruling and doctrine of the *Milligan Case* have never been questioned by the court. With entire uniformity the authorities have laid down and applied the rule of actual necessity or emergency as the test of the authority of the Congress or the President to exercise any incidental war power in derogation of the constitutional rights of the citizen. *Mitchell* v. *Harmony*, 13 How. 115, 135; *Raymond* v. *Thomas*, 91 U. S. 712, 716; *Milligan* v. *Hovey*, 3 Biss. 13; *In re Egan*, 5 Blatchf. 319; *McLaughlin* v. *Green*, 50 Mississippi, 453; *Johnson* v. *Jones*, 44 Illinois, 142, 154; *Griffin* v. *Wilcox*, 21 Indiana, 370; *Nance & Mays* v. *Brown*, 71 W. Va. 519, 524; *United States* v. *Hicks*, 256 Fed. Rep. 707; *Legal Tender Cases*, 12 Wall. 457, 540.

To argue that the war with Germany and Austria is not yet legally and formally terminated does not meet the point at all. The existence of actual war emergency and not mere *de jure* war is the controlling test of the right to deny the constitutional rights of citizens of the United States. That is clearly the doctrine of the *Milligan Case*. The mere fact that a *de jure* state of war still exists

would not warrant the subversion of state rights or constitutional immunities, if there be as matter of fact no actual war emergency.

The cases which hold that, strictly and legally speaking, the war will not be terminated until a treaty of peace is ratified, mostly deal with such matters as the statute of limitations or the rights of aliens. Of course, an alien enemy ordinarily cannot sue until peace has been formally restored, and, therefore, the running of the statute is suspended in the meanwhile; but such precedents have no bearing upon the question here under discussion.

The contention of the Government seems to be that the right of Congress to exert its war powers is absolute, that the question as to what particular measures are necessary is committed wholly to the discretion of Congress and that the judgment of Congress when expressed is not subject to review by the courts. It is submitted that this contention is clearly in conflict with the fundamental doctrine upon which this court has uniformly proceeded ever since the decision in *Marbury* v. *Madison*, 1 Cranch, 137, and that it has long been settled that Congress is never the sole judge of the extent of its powers or of the existence of jurisdictional facts authorizing its action. It must be borne in mind that practically all the war powers of Congress, such as to raise and support armies and to provide and maintain a navy, exist and must be exercised in times of peace as well as war. These powers are expressly delegated and not limited to war times. But the incidental or implied powers are *expressly* limited to those "which shall be necessary and proper for carrying into execution" the delegated powers, and Congress is never the sole judge of their appropriateness. The contention of the Government is fully refuted by the reasoning of Mr. Chief Justice Chase in *Hepburn* v. *Griswold*, 8 Wall. 603, 617.

The present contention on behalf of the Government

is, in final analysis, that the assumption by Congress of a power to prohibit intoxicating and non-intoxicating beverages during a technical state of war is absolutely conclusive and precludes any inquiry by the courts as to the conditions actually existing when the acts in question were passed as alleged war measures, or when they are sought to be enforced against the individual. If sound, this view would vest in Congress as well as in the President the broadest autocratic and despotic war powers, as soon as a technical state of war arose.

But it should be manifest that during the existence of a state of war neither Congress nor the President becomes vested *ipso facto* with unlimited and despotic power throughout the United States, where no actual hostilities are being conducted, and that neither branch of the Government becomes the sole judge of the appropriateness of any means it may determine to be necessary and proper as a war measure. Otherwise, the moment a nominal or legal state of war arose, although without actual hostilities or very limited hostilities (as in the case of the war at sea with France in 1798 or with Tripoli in 1801), the Congress and the President would at once become vested with unlimited despotic powers to determine arbitrarily what means were necessary and proper, which would mean that during the existence of any period of war (and even as the Government suggested on the oral argument below during the period of all aftermaths of the war) Congress and the President in their several departments would be vested with such autocratic and despotic powers that the people of the United States would be quite at their mercy.

Fortunately, no such doctrine has ever been tolerated by this court. On the contrary, ever since the great case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, the assumption of power by Congress or the Executive has never been held to be conclusive. The controlling judicial

inquiry always has been recognized to be whether the end in view is or is not legitimate at the time of the passage and enforcement of an act of Congress; whether it is or is not an appropriate means to such a legitimate end, and whether it is or is not then plainly adapted to that end.

Furthermore, the constitutionality of any statute, whether criminal or not, must be determined as of the time and in the light of the circumstances existing when it is sought to be enforced against the individual. *Castle* v. *Mason*, 91 Oh. St. 296, 303. The justiciable question always is whether or not a statute sought to be applied in a particular case against a person complaining or defending, does or does not violate the constitutional rights of that person at the time its terms and provisions are attempted to be enforced. The rate cases furnish a striking example and analogy. *Lincoln Gas & Electric Light Co.* v. *Lincoln*, 250 U. S. 256, 269; *Minnesota Rate Cases*, 230 U. S. 352, 473; *Missouri Rate Cases*, *ib.* 474, 508; *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 18; *Willcox* v. *Consolidated Gas Co.*, *ib.* 19, 54; and particularly *Municipal Gas Co.* v. *Public Service Comm.*, 225 N. Y. 89, 95, 97. This court recognized the principle now being urged in *Johnson* v. *Gearlds*, 234 U. S. 422, 446, and *Perrin* v. *United States*, 232 U. S. 478, 486.

The question before the court is, therefore, solely this: Is there *now* such actual war emergency or necessity in this country as would in any reasonable aspect warrant the enforcement of the new and extensive prohibitions contained in the Act of October 28, 1919? The President has emphatically and unequivocally answered this inquiry in the negative in his messages to Congress of May 20th and October 27th. And Congress itself in the very act now before the court has recognized that the war is practically concluded by referring thereto in § 38 of title II as "the recent war."

In all the cases heretofore cited in support of war legislation, the legislation was warranted as of the date when it was operative and sought to be enforced. But none of them intimated that a person might be deprived of his liberty or property at some future date under the exercise of the war power, notwithstanding the fact that no actual war necessity for the sacrifice or denial of his constitutional rights might as matter of fact then exist.

The cases of *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135; *Dakota Central Telephone Co.* v. *South Dakota*, *ibid.* 163; *Burleson* v. *Dempcy*, *ibid.* 191; *MacLeod* v. *New England Telephone & Telegraph Co.*, *ibid.* 195; and *Commercial Cable Co.* v. *Burleson*, 255 Fed. Rep. 99, *s. c.*, 250 U. S. 360, in no way sustain the proposition that any implied declaration by Congress would be conclusive as to the existence of a present necessity justifying the prohibitions in question.

The justiciable question as to the existence or continuance of a war emergency presents, it is true, a very high and delicate matter of public law and may as such involve grave difficulties of proof. In the absence of satisfactory evidence, the court might decline to hold that Congress had acted without authority in view of the continuance of a *de jure* state of war until a treaty of peace has been formally ratified. But the case at bar involves no such difficulty of proof because the President himself has in effect proclaimed in his veto message of October 27, 1919, and in other declarations that the war emergencies, which alone could uphold the prohibition legislation now in question, no longer exist.

In view of the war powers and responsibilities of the President and his express duty to inform Congress as to the state of the Union, it must be clear that it is especially fit and proper that he should determine officially as to the existence or continuance of a war emergency, and

that, in the absence of other proof, his declarations as to this question of fact of actual date and condition should be deemed the best evidence and the most certain criteria. It involves a matter peculiarly within his knowledge and jurisdiction, and in such a matter the decision of the President, as Executive and Commander-in-chief, ought to be accepted as conclusive in the absence of any other proof or criteria.

If it be urged again by the Government that the question whether a war emergency exists or continues is in great measure a political question, to be conclusively determined by the political branch of the Government, surely it is none the less political and conclusive when it is decided by the President, and *a fortiori* so when there is no evidence either before Congress or the courts to the contrary of, or in any way impeaching, his finding.

Some of the reasons for attributing the greatest weight to the declarations of the President as to the actual state of the country, in war as well as in peace, are stated by Mr. Justice Story in his Commentaries, § 1561. And see *Martin* v. *Mott*, 12 Wheat. 19; *Luther* v. *Borden*, 7 How. 144; *Prize Cases*, 2 Black, 635; *The Protector*, 12 Wall. 700, 702.

It would present a very strange anomaly if it were to be held that notwithstanding the solemn official declarations of the President, in respect of a matter peculiarly within his knowledge and jurisdiction, to the effect that a particular war emergency no longer existed calling for or justifying prohibition, the Congress could nevertheless disregard his findings and proceed to enact legislation based upon the assumption of a contrary state of facts.

The condition of the Act of November 21, 1918, has been satisfied.

The President has sufficiently proclaimed the conclusion of the war and demobilization.

The Act of November 21, 1918, had been judicially interpreted by ten United States District Courts to include only intoxicating beverages; the Act of October 28, 1919, provides that *hereafter* the prohibition shall be construed to mean such beverages which contain one-half of one percentum or more of alcohol. It cannot, of course, operate to overthrow the decisions of the courts as to the true construction of the prior act, or apply to alleged offenses committed before the passage of the new act. *Jaehne* v. *New York*, 128 U. S. 189.

Therefore, the controlling question in the case at bar is whether on October 28, 1919, such a war condition or emergency existed as would constitutionally warrant the exercise of the war powers of Congress in derogation or destruction of the constitutional and property rights of the complainant and other brewers of the United States. The act establishes a new and different rule for the future, and thus what has heretofore been wholly lawful is "hereafter" to be a crime. Harmless beverages which were freely and legally manufactured and sold while the war was at its height and while the Act of November 21, 1918, was alone in effect, are now declared to be prohibited and their value as property to be destroyed, and that too as a war measure! New and most drastic punishments are provided for the new offenses created.

The language of the Eighteenth Amendment presents a very grave question as to the power of Congress to enact prohibition legislation effective before the expiration of one year from the ratification of that Amendment.

Congress and the people of the United States, who proposed and adopted this Amendment in war time, clearly intended that the power to prohibit intoxicating liquors should not be exercised by Congress until the expiration of one year from ratification. They appreciated that the Amendment meant the destruction of large industries worth hundreds of millions of dollars without any com-

pensation at all and the means of livelihood of thousands of persons, as well as the withdrawal from the States of a source of large revenue. Accordingly, they decreed by express constitutional provision that there should be one year of grace in order to serve practically in lieu of compensation, and to give those engaged in the industries affected a fair and reasonable opportunity to wind up their businesses, adjust and liquidate their affairs, and find new occupations with a minimum of hardship and social dislocation, and to enable States and municipalities to accommodate and readjust their fiscal systems to the new order. Cong. Rec., December 17, 1917, p. 432.

Even if the war were still active and flagrant, the provision of the Amendment, adopted during war times, should limit and qualify any implied war power in derogation thereof, and certainly so as to emergencies which existed when the Amendment was proposed and adopted. No implied war power to ban both intoxicants and non-intoxicants should be held to exist at the present time in the very face of the fact that the constitutional amendment itself expressly deferred the prohibition for one year and impliedly guaranteed to all those engaged in the business of manufacturing and selling intoxicating liquors that they should meanwhile remain unmolested, so far as the exercise of federal power of prohibition was concerned, until the expiration of one year from the date of ratification. It is in effect proposed to add to the Amendment a proviso authorizing Congress to deny any time of grace if deemed necessary and proper as a war measure!

It does not follow that the Government would have been disabled from meeting new emergencies of war if they had arisen after the ratification of this Amendment. Congress could always authorize condemnation of whatever food products or other property might be needed for war purposes, or ration the food of the country, or, in the exercise of its powers to make rules for the army

and navy, forbid liquor to be sold to soldiers and sailors, etc. Only general federal prohibition was impliedly forbidden during the year of grace.

Even if Congress in the exercise of its war powers could prohibit the manufacture and sale of intoxicating liquors, it could not prohibit the manufacture and sale of beverages which are indisputably and concededly non-intoxicating. Any such stretch of legislation, if upheld as incidental to any incidental war power of Congress to prohibit intoxicating liquors, would carry the incidental power of Congress beyond anything yet approved or permitted by this court. The reasoning which is advanced to uphold this extension of power under the National Prohibition Act of October 28, 1919, would practically overthrow the doctrine of *Hammer* v. *Dagenhart*, 247 U. S. 251, 273, 276, and analogous cases, denying to Congress any such general police power in aid of its express powers.

The case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, presented for consideration solely the police powers of the States in so far as they were limited by the Fourteenth Amendment. The national government has no police power and may not, therefore, enact laws prohibiting the manufacture and sale of intoxicants simply because Congress deems that course advisable for the public welfare. The *Purity Extract Co. Case*, moreover, prohibited all malt liquors, whether intoxicating or not, because malt beverages might be used to conceal intoxicating malt liquors. No such object can be attributed to the Act of Congress of October 28, 1919, because it does not prohibit all malt liquors, but divides them by an arbitrary standard of percentage of alcohol.

It does not follow that because Congress may exercise the power of prohibiting intoxicants in war time, it can go further and ban non-intoxicants as an incident to this implied incidental power. The Constitution merely confers upon Congress the right to exercise powers incidental

to enumerated powers if necessary and proper, not the right to exercise powers incidental to implied incidental powers. Any other theory would strip the States of all their powers for, if each implied incidental power breeds new powers by added implication, there is no point at which the process can be halted, but the result must in time be one consolidated government in place of our present federal system. The fallacy of such a doctrine was early exposed by Jefferson in a letter to Livingston (Ford's Jefferson, vol. VII, p. 44). See, also, *McCulloch* v. *Maryland*, 4 Wheat. 316, 411; 3 Hamilton's Works (Lodge's ed.), p. 192; 1 Congressional Debates, p. 1899 (Madison, Feb., 1791); 22 Annals of Congress, p. 212 (Clay, Feb., 1811); Rept. No. 1143, House of Rep., Feb. 26, 1919, pp. 7, 9.

The Act of Congress of October 28, 1919, is particularly unjust and oppressive in respect of the brewers of the United States. These brewers were engaged in manufacturing and selling a beverage which is non-intoxicating, which was expressly authorized by the President in his proclamation of December 8, 1917, in force during a large part of the war period, and which was prohibited by him only in his proclamation of September 16, 1918, when the conservation of all the food products of the country became necessary. Millions of dollars worth of non-intoxicating beer have been manufactured in good faith in reliance upon the proclamations of the President of January 30 and March 4, 1919, and the value of all this product will in large measure be destroyed by the operation of the Act of October 28, 1919, if it be constitutional, without any compensation whatever, on the theory that this sacrifice of the property of a particular class at this time is necessary and proper for carrying into execution the war powers of the Nation!

As to the non-intoxicating beer on hand on October 28, 1919, which was manufactured under authority of the

President's proclamations of December 8, 1917, and January 30 and March 4, 1919, it is submitted that its sale could not be prohibited and its commercial value destroyed without the just compensation guaranteed to all by the Fifth Amendment. *Wynehamer* v. *People*, 13 N. Y. 378; *Bartemeyer* v. *Iowa*, 18 Wall. 129, 133; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 32; *Eberle* v. *Michigan*, 232 U. S. 700, 706; *Barbour* v. *Georgia*, 249 U. S. 454, 460; *Mugler* v. *Kansas*, 123 U. S. 623.

[A supplemental brief was submitted on the proposition that the Act of November 21, 1918, was not intended to include non-intoxicating beer or wine—as to which, see *United States* v. *Standard Brewery*, *ante*, 210.]

The Solicitor General and *Mr. Assistant Attorney General Frierson* for appellees.

Mr. Justice Brandeis delivered the opinion of the court.

By the Act of August 10, 1917, c. 53, § 15, 40 Stat. 276, 282, a war measure known as the Lever Act, Congress prohibited the use after September 9, 1917, of food materials or feeds in the production of distilled spirits for beverage purposes and authorized the President to limit or prohibit their use in the production of malt or vinous liquors for beverage purposes, so far as he might, from time to time, deem it essential to assure an adequate supply of food, or deem it helpful in promoting the national security or defense. Under the power so conferred the President, by proclamation of December 8, 1917, 40 Stat. 1728, prohibited the production after January 1, 1918, of any "malt liquor except ale and porter" containing more than 2.75 per centum of alcohol by weight. By proclamation of September 16, 1918, 40 Stat. 1848, the prohibition was extended to "malt liquors, including near beer, for

beverage purposes, whether or not such malt liquors contain alcohol"; and by proclamation of March 4, 1919, 40 Stat. 1937, the prohibition was limited "to intoxicating malt liquors." Under § 2 of the act the duty of enforcing the above provisions was assigned to the Commissioner of Internal Revenue. This act contained no provision prohibiting the sale of intoxicating or other liquors.

On November 21, 1918, the so-called War-Time Prohibition Act (c. 212, 40 Stat. 1045) was approved. It provided that:

"After May first, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. . . ."

On February 6, 1919, the Commissioner of Internal Revenue ruled (Treasury Decision 2788) that a beverage containing as much as one-half of one per centum of alcohol by volume would be regarded as intoxicating within the intent of the Act of November 21, 1918; and that after May 1, 1919, persons would not be permitted to qualify as brewers, if the alcoholic content of their product equalled or exceeded that percentage. In so ruling the Commissioner adopted and applied to this prohibitory act the same classification of malt liquors which had been applied in administering the laws concerning the taxation of beer and other similar fermented liquors.

For since 1902 (Treasury Decision 514) fermented liquor containing as much as one-half of one per centum of alcohol had been treated as taxable under Rev. Stats. §§ 3339 and 3242; and this classification was expressly adopted in the War Revenue Act of October 3, 1917, c. 63, § 307, 40 Stat. 311. The correctness of this construction of the act was promptly and earnestly controverted by the brewers, who insisted that Congress had intended to prohibit the production only of such beer or other malt liquors as were in fact intoxicating. The attempt was then made to remove the doubt by new legislation before May 1, 1919, when the act would by its terms become operative. On February 26 the House Committee on the Judiciary reported favorably an amendment to H.R. 13581 providing: "The words 'beer, wine or other intoxicating malt or vinous liquors' in the war prohibition act shall be construed to mean any liquors which contain in excess of one-half of one per centum of alcohol." The Sixty-fifth Congress ended on March 4 without acting on this bill; and the Sixty-sixth Congress did not convene in Extra Session until May 19. On June 30, the House Committee on the Judiciary reported substantially the same provision as § 1 of Title I of H. R. 6810; but it was not enacted until October 28, 1919, when as the Volstead Act it was passed over the President's veto.[a]

Note (a):—

"The term 'War Prohibition Act' used in this Act shall mean the provisions of any Act or Acts prohibiting the sale and manufacture of intoxicating liquors until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States. The words 'beer, wine, or other intoxicating malt or vinous liquors' in the War Prohibition Act shall be hereafter construed to mean any such beverages which contain one-half of 1 per centum or more of alcohol by volume: *Provided*, That the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it con-

Immediately after the passage of the Volstead Act, this suit was brought in the District Court of the United States for the Southern District of New York by Jacob Ruppert against Caffey, United States Attorney, and McElligott, Acting Collector of Internal Revenue, to enjoin the enforcement as against the plaintiff of the penalties provided in the War-Time Prohibition Act as amended by the Volstead Act. It was heard below on plaintiff's motion for a preliminary injunction and defendants' motion to dismiss; and having been dismissed, was brought here by direct appeal under § 238 of the Judicial Code. The bill alleged that plaintiff, the owner of a brewery and appurtenances, was on October 28, 1919, engaged in the manufacture of a beer containing more than one-half of one per centum of alcohol by volume and less than 2.75 per centum by weight or 3.4 per centum by volume, and had then on hand a large quantity of such beer; and that this beer was not in fact intoxicating. Plaintiff contended (1) that the Act of November 21, 1918, had become void or had expired by its own terms before the bill was filed; (2) that its prohibition by its terms was limited to beer which was in fact intoxicating; (3) that the Act of October 28, 1919, Title I, § 1, which purported to extend the prohibition to the manufacture and sale of beer not in fact intoxicating, exceeded the war power of Congress; and that thereby violation of rights guaranteed to plaintiff by the Fifth Amendment was threatened.

This case was heard and decided below with *Dryfoos* v. *Edwards*, *ante*, 146; and it was argued here on the same day with that case and *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *ante*, 146. For the reasons set forth in

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tains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of Title II of this Act, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe."

the opinion in those cases, the Act of November 21, 1918, was and remained valid as against the plaintiff and had not expired. For the same reasons § 1 of Title I of the Act of October 28, 1919, was not invalid, merely because it was new legislation. But it is insisted that this legislation is nevertheless void as against the plaintiff, because Congress could not, even under its full war powers, prohibit the manufacture and sale of non-intoxicants, and, at all events, could not without making compensation, extend the prohibition to non-intoxicating liquor acquired before the passage of the act. These objections require consideration.

First: May the plaintiff show as a basis for relief that the beer manufactured by it with alcoholic content not greater than 2.75 per centum in weight and 3.4 per centum in volume is not in fact intoxicating? The Government insists that the fact alleged is immaterial since the passage of the Volstead Act by which the prohibition of the manufacture and sale is extended to all beer and other malt liquor containing as much as one-half of one per centum of alcohol by volume.

If the war power of Congress to effectively prohibit the manufacture and sale of intoxicating liquors in order to promote the Nation's efficiency in men, munitions and supplies is as full and complete as the police power of the States to effectively enforce such prohibition in order to promote the health, safety and morals of the community, it is clear that this provision of the Volstead Act is valid, and has rendered immaterial the question whether plaintiff's beer is intoxicating. For the legislation and decisions of the highest courts of nearly all the States establish that it is deemed impossible to effectively enforce either prohibitory laws or other laws merely regulating the manufacture and sale of intoxicating liquors, if liability or inclusion within the law is made to depend upon the issuable fact whether or not a particular liquor made or sold as a beverage is intoxicating. In other words, it clearly appears

that a liquor law, to be capable of effective enforcement must, in the opinion of the legislatures and courts of the several States, be made to apply either to all liquors of the species enumerated, like beer, ale or wine, regardless of the presence or degree of alcoholic content; or if a more general description is used, such as distilled, rectified, spirituous, fermented, malt or brewed liquors, to all liquors within that general description regardless of alcoholic content;[b] or to such of these liquors as contain

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NOTE (*b*):—

Cases to this effect are *Marks* v. *State*, 159 Alabama, 71; *Brown* v. *State*, 17 Arizona, 314; *Bradshaw* v. *State*, 76 Arkansas, 562; *Seibert* v. *State*, 121 Arkansas, 258; *In re Lockman*, 18 Idaho, 465; *Hansberg* v. *People*, 120 Illinois, 21, 23 (dictum); *Kurz* v. *State*, 79 Indiana, 488; *Sawyer* v. *Botti*, 147 Iowa, 453; *State* v. *Colvin*, 127 Iowa, 632; *State* v. *Miller*, 92 Kansas, 994; *State* v. *Trione*, 97 Kansas, 365; *Commonwealth* v. *McGrath*, 185 Massachusetts, 1; *Extract & Tonic Co.* v. *Lynch*, 100 Mississippi, 650; *State* v. *Centennial Brewing Co.*, 55 Montana, 500; *Luther* v. *State*, 83 Nebraska, 455; *State* v. *Thornton*, 63 N. H. 114; *People* v. *Cox*, 106 App. Div. (N. Y.) 299; *People* v. *O'Reilly*, 129 App. Div. (N. Y.) 522; *LaFollette* v. *Murray*, 81 Oh. St. 474; *State* v. *Walder*, 83 Oh. St. 68; *State* v. *Bottling Works*, 19 N. Dak. 397; *State* v. *Ely*, 22 S. Dak. 487; *State* v. *Oliver*, 26 W. Va. 422, 427 (dictum); *Pennell* v. *State*, 141 Wisconsin, 35; *United States* v. *Cohn*, 2 Ind. Ter. 474; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192.

Contra:—*City of Bowling Green* v. *McMullen*, 134 Kentucky, 742; *Reisenberg* v. *State*, 84 S. W. Rep. (Tex.) 585; *State* v. *Olsen*, 95 Minnesota, 104; *Intoxicating Liquor Cases*, 25 Kansas, 751; *State* v. *Virgo*, 14 N. Dak. 293; *State* v. *Maroun*, 128 Louisiana, 829; *Howard* v. *Acme Brewing Co.*, 143 Georgia, 1.

In Kansas, the legislature overruled this decision by Laws of 1909, c. 164, § 4, see *State* v. *Trione*, *supra;* in Minnesota, made the prohibition apply to all malt liquors containing as much as ½ of 1% of alcohol by volume, Laws of 1919, c. 455, p. 537; in North Dakota by Laws of 1909, c. 187, p. 277, see *State* v. *Bottling Works*, 19 N. Dak. 397, the prohibition applied to all liquors which retained "the alcoholic principle;" in Louisiana Acts of 1914, Nos. 146, 211, operated to cut down the per cent. of alcohol to 1.59, see *State* v. *George*, 136 Louisiana, 906. In Georgia Acts of 1919, p. 931, changed the rule of *Howard* v. *Acme Brewing Co.*, *supra*, see Note (*d*) 4, *infra*, 289.

a named percentage of alcohol; and often several such standards are combined so that certain specific and generic liquors are altogether forbidden and such other liquors as contain a given percentage of alcohol.

A test often used to determine whether a beverage is to be deemed intoxicating within the meaning of the liquor law is whether it contains one-half of one per cent. of alcohol by volume. A survey of the liquor laws of the States reveals that in seventeen States the test is either a list of enumerated beverages without regard to whether they contain any alcohol or the presence of any alcohol in a beverage, regardless of quantity; [c] in eighteen States it

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NOTE (c):—

1. Alabama:—Gen. Laws Sp. Sess. 1907, No. 53, § 1, p. 71, made it unlawful to sell "any alcoholic, spirituous, vinous or malt liquors, intoxicating bitters or beverages, or other liquors or beverages . . which if drunk to excess will produce intoxication."

Marks v. *State*, 159 Alabama, 71, 78, stated that "or other liquors or beverages . . . which if drunk to excess will produce intoxication" did not modify or limit the prohibition of the liquors enumerated. Any unenumerated liquor, however, must be proved to be intoxicating if drunk to excess.

Gen. Laws, 1919, Act No. 7, p. 6, in terms prohibits all liquors containing any alcohol.

2. Arizona:—Constitution, Art. 23, § 1, prohibits "ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind."

Brown v. *State*, 17 Arizona, 314, held that "beer" was prohibited whether or not it was intoxicating.

3. Arkansas:—Acts of 1917, Act 13, p. 41, as amended by Acts of 1919, Act 87, p. 75, prohibits "any alcoholic, vinous, malt, spirituous or fermented liquors."

Seibert v. *State*, 121 Arkansas, 258, held that the enumerated liquors are prohibited whether they are intoxicating or not if they contained any alcohol.

An earlier act contained the words "or other intoxicating liquors" following "or fermented liquors." It was held in *Bradshaw* v. *State*, 76 Arkansas, 562, that this clause did not modify the enumerated liquors and that they were prohibited whether intoxicating or not.

4. Colorado:—Sess. Laws, 1915, c. 98, § 30—(Prohibition)—as

is the presence of as much as or more than one-half of one per cent. of alcohol;[d] in six States, one per cent. of alcohol;[e] in one State, the presence of the "alcoholic principle;" and in one State, two per cent. of alcohol.[g] Thus in

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amended by Sess. Laws, 1919, c. 141, prohibits "intoxicating liquors . . . no matter how small the percentage of alcohol they may contain."

4½. Hawaii:—Rev. Laws, 1915, § 2101. (License Law) "'Intoxicating liquors' . . . shall be held to include spirituous liquors, and any beverage in which may be found any percentage of distilled spirits, spirits, alcohol and alcoholic spirit as defined by the laws of the United States, and any sake, beer, lager beer, ale, porter and malt or fermented or distilled liquors."

5. Idaho:—Sess. Laws, 1909, p. 18. (Local Option)—"spirituous, vinous, malt, and fermented liquors . . . and other drinks that may be used as a beverage and produce intoxication."

In re Lockman, 18 Idaho, 465, held that the enumerated liquors are within the act whether or not they are intoxicating.

Constitutional Amendment of Nov. 7, 1916 (Prohibition). (Sess. Laws, 1917, p. 528.) The Enforcement Laws are cumulative, including Sess. Laws, 1915, c. 28; Sess. Laws, 1915, c. 11 (see § 23); Sess. Laws, 1911, c. 15; and Sess. Laws, 1909, p. 18. Thus the definition and interpretation above are retained.

6. Iowa:—Rev. Code (1897–1915), § 2382. Prohibits "any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever."

State v. *Intoxicating Liquors*, 76 Iowa, 243 (1888); and *State* v. *Colvin*, 127 Iowa, 632 (1905); *Sawyer* v. *Botti*, 147 Iowa, 453 (1910), held that liquor containing any alcohol whatever is prohibited.

7. Kansas:—Laws of 1881, c. 128, § 1 (Gen. Stats. 1915, § 5498). Prohibits "any spirituous, malt, vinous, fermented or other intoxicating liquors."

Intoxicating Liquor Cases, 25 Kansas, 751, held that in every case the question of the intoxicating quality of the beverage must go to the jury.

Laws of 1909, c. 164, § 4 (Gen. Stats. 1915, § 5501), amended the Act of 1881 as follows: "All liquors mentioned in section 1 of this act shall be construed and held to be intoxicating liquors within the meaning of this act."

State v. *Miller*, 92 Kansas, 994; *State* v. *Trione*, 97 Kansas, 365, de-

forty-two of the forty-eight States—Maryland appears in two classes above—a malt liquor containing over two per cent. of alcohol by weight or volume is deemed, for the purpose of regulation or prohibition, intoxicating as a

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clared that the former case is no longer the law and that the mere presence of the liquors mentioned makes the substance intoxicating for purposes of the prohibition statutes.

See also Laws of 1917, cc. 215, 216, "Bone Dry Prohibition Law."

8. Louisiana:—*Shreveport Ice Co.* v. *Brown*, 128 Louisiana, 408, held that a statute regulating the sale of "spirituous and intoxicating liquors" includes only intoxicating liquors.

Acts of Extra Session, 1910, No. 171, defines "Grog-Shop" as a place where "intoxicating, spirituous, vinous, or malt liquors are sold" (and forbids them in prohibition territory).

State v. *Maroun*, 128 Louisiana, 829, held that the malt liquors must be intoxicating to be within the meaning of the statute.

Acts of 1914, No. 146, repeats a similar definition of grog-shop or blind tiger. Acts of 1914, No. 211, forbids the manufacture of near-beer with more than 1.59% of alcohol by weight or 2% by volume; and prohibits the sale of the near-beer thus made under the same roof where any other beverage is sold.

State v. *George*, 136 Louisiana, 906, seems to hold that this near-beer may be sold in prohibition territory where the "grog-shops" are not allowed.

Acts of 1916, No. 14, prohibits the sale or keeping for sale of any "malt liquors, whether intoxicating or not, and whether containing alcohol or not, in any parish, ward, city, town or village of this State where the sale of intoxicating liquors is prohibited by law or ordinance. . . ."

9. Maryland:—Laws of 1914, c. 831, § 1, p. 1569 (Prohibition in Certain Counties), forbids "any spirituous, vinous, fermented, malt or intoxicating liquors, or any mixture thereof containing alcohol for beverage purposes. . . ."

Laws of 1916, c. 389, § 1, p. 786. Prohibits in a certain county "any kindred preparation or beverage, having the appearance and taste of Lager Beer . . . except those beverages that are labeled . . . stating that the beverage is free of alcohol."

See also Note *d* (8), *infra*, 290; and Note *h*, *infra*, 296. These citations are not exhaustive of the Maryland county prohibition statutes.

10. Michigan:—Public Acts, 1919, No. 53, § 3, p. 81. "'Intoxicating liquors' . . . include any vinous, malt, brewed, fermented or

matter of law. Only one State has adopted a test as high as 2.75 per cent. by weight or 3.4 per cent. by volume.[h] Only two States permit the question of the intoxicating character of an enumerated liquor to be put in issue.[i] In

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spirituous liquors . . . and all liquids . . . which contain any alcohol and are capable of being used as a beverage."

11. Mississippi:—Code of 1906, § 1746, as amended by Laws of 1908, c. 115, p. 116 (Code, 1917, § 2086). Prohibits the sale of "any vinous, alcoholic, malt, intoxicating or spirituous liquors, or intoxicating bitters, or other drinks which if drank to excess will produce intoxication."

Fuller v. *City of Jackson*, 97 Mississippi, 237; *Extract & Tonic Co.* v. *Lynch*, 100 Mississippi, 650. All the enumerated drinks are prohibited whether they contain alcohol or are intoxicating or both or neither.

Laws of 1918, c. 189, § 1, p. 210. Prohibits "spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind."

12. New Mexico:—Stats. 1915, § 2874. "All persons who make for sale fermented liquors of any name or description, from malt, wholly or in part, or from any substitute therefor, shall be considered brewers." Section 2937. "The words 'intoxicating liquors' . . . include all malt, vinous, and spirituous liquors."

Constitutional Amendment, proposed by Legislature of 1917, Laws of 1917, p. 352, prohibits "ardent spirits, ale, beer, alcohol, wine or liquor of any kind whatsoever containing alcohol."

13. New York:—Laws of 1897, c. 312, § 2; and Laws of 1903, c. 486, § 2, as amended by Laws of 1905, c. 679, § 2, defining intoxicating liquors as "all distilled or rectified spirits, wine, fermented and malt liquors."

People v. *Cox*, 106 App. Div. 299, held that "Malt Rose containing .74% of alcohol and made from malt was within the meaning of the act.

People v. *O'Reilly*, 129 App. Div. 522 (affd. 194 N. Y. 592), holds that beer comes within the act whether intoxicating or not, and declares that an earlier line of cases holding that the intoxicating quality is always for the jury to decide are no longer applicable where liquors are named in the act.

Laws of 1917, c. 624, § 2, p. 1835. City Local Option Law. Continues the definition.

14. Ohio:—Rev. Stats. 1906, §§ 4364–9, laid a tax on the business of "trafficking in spirituous, vinous, malt, or any intoxicating liquors."

LaFollette v. *Murray*, 81 Ohio St. 474, held that "Friedon Beer" a

three other States the matter has not been made clear either by decision or legislation.[j] The decisions of the courts as well as the action of the legislatures make it clear—or, at least, furnish ground upon which Congress

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malt liquor containing .47% of alcohol and not intoxicating was within the statute.

State v. *Walder*, 83 Ohio St. 68.

Laws of 1919, §§ 6212–15, p. 388. (Prohibition.) ". . . 'liquor' or . . . 'intoxicating liquors' . . . include any distilled, malt, spirituous, vinous, fermented or alcoholic liquor, and also any alcoholic liquid . . . which . . . is . . . capable of being used as a beverage."

15. South Dakota:—Sess. Laws of 1890, c. 101, § 6, p. 229 (Prohibition). Intoxicating liquors include "all spirituous, malt, vinous, fermented or other intoxicating liquors or mixtures . . . that will produce intoxication."

Rev. Pol. Code, 1903, § 2834, requires a license to sell "any spirituous, vinous, malt, brewed, fermented or other intoxicating liquors."

State v. *Ely*, 22 S. Dak. 487, held that the liquors named come within the act whether or not they are intoxicating.

Rev. Code, 1919, § 10237. "'Intoxicating Liquors' . . . include whiskey, alcohol, brandy, gin, rum, wine, ale, beer, absinthe, cordials, hard or fermented cider, . . . and all distilled, spirituous, vinous, malt, brewed and fermented liquors, and every other liquid . . . containing alcohol, which . . . is capable of being used as a beverage."

15½. United States:—28 Stat. 697, § 8 (Indian Territory Prohibition), prohibits "any vinous, malt, or fermented liquors, or any other intoxicating drinks."

United States v. *Cohn*, 2 Ind. Ter. 474, held that the act prohibits all malt liquors whether or not they are intoxicating.

See also 39 Stat. 903 (Alaska Prohibition); and 39 Stat. 1123 (D. of C. Prohibition), both of which prohibit "all malt liquors."

16. Washington:—Code, 1912, Title 267, § 45 (Local Option). "'Intoxicating liquor' . . . shall . . . include whiskey, brandy, rum, wine, ale, beer, or any spirituous, vinous, fermented, malt or any other liquor containing intoxicating properties . . . except preparations compounded by a registered pharmacist, the sale of which would not subject him to the payment of the special liquor tax required by the laws of the United States."

Sess. Laws of 1915, c. 2, § 2 (Prohibition). "'Intoxicating liq-

reasonably might conclude—that a rigid classification of beverages is an essential of either effective regulation or effective prohibition of intoxicating liquors.[k]

Purity Extract Co. v. *Lynch*, 226 U. S. 192, determined that state legislation of this character is valid and set forth

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uor' . . . shall . . . include whiskey, etc., [as above] and all liquids . . . which contain any alcohol, which are capable of being used as a beverage."

State v. *Hemrich*, 93 Washington, 439.

17. Wisconsin:—Gen. Stats., 1911, § 1565c (Local Option), "any spirituous, malt, ardent or intoxicating liquors or drinks."

Pennell v. *State*, 141 Wisconsin, 35, holds that the statute forbids fermented malt liquors containing alcohol whether intoxicating or not. See also Montana, Note (*g*), *infra*, 295.

NOTE (*d*):—

1. Connecticut:—Public Acts, 1919, c. 241, p. 2917, defines intoxicating liquors, "all beer manufactured from hops and malt or from hops and barley, and all beer on the receptacle containing which the laws of the United States require a revenue stamp to be affixed [but it] shall not include beverages which contain no alcohol. . . ."

2. Delaware:—Laws of 1917, c. 10, p. 19 (Local Option Enforcement), defines as follows: "all liquid mixtures . . . containing so much as ½ of 1% of alcohol by volume shall be deemed liquors and shall be embraced in the word 'liquors' as hereinafter used in this Act."

3. Florida:—Acts of Sp. Sess. 1918, c. 7736, § 7, as amended by Acts of 1919, c. 7890, defines intoxicating liquor, which it prohibits, as all beverages containing "½ of 1% of alcohol, or more, by volume."

4. Georgia:—Acts of 1915, Sp. Sess., pp. 77, 79 [Park's Annotated Code, Supplement, 1917, Penal Code, § 448 (b)], defines "prohibited liquors" as ". . . beer, . . . near-beer, . . . and . . . beverages containing ½ of 1% of alcohol or more by volume."

5. Illinois:—Rev. Stats. 1874, c. 43, § 1 ("Dram Shop Act"), defines a dram shop as a place "where spirituous or vinous or malt liquors are retailed . . . and intoxicating liquors shall be deemed to include all such liquors."

Hansberg v. *People*, 120 Illinois, 21, 23. Indictment for selling "intoxicating liquors." Proof of selling "beer." The court said: "No evidence whatever was offered or admitted for the purpose of explaining or showing what beer was made of, or what its characteristics were, or whether it was malt, vinous, spirituous or intoxicating."

with clearness the constitutional ground upon which it rests: "When a State exerting its recognized authority undertakes to express what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make

Laws of 1919, p. 931 (Search and Seizure Law). "'Intoxicating liquor or liquors' shall include all distilled, spirituous, vinous, fermented or malt liquors which contain more than ½ of 1% by volume of alcohol."

6. Indiana:—Rev. Stats. 1881, § 2094, "whoever . . . sells . . . any spirituous, vinous, malt, or other intoxicating liquors."

Kurz v. *State*, 79 Indiana, 488, 490: "It devolves on the State, therefore, to prove that the beer sold was either a malt liquor or that it was, in fact, intoxicating liquor."

Laws of 1911, c. 119, § 29 (Saloon Regulation Act). "The words 'intoxicating liquors,' shall apply to any spirituous, vinous or malt liquor, or to any intoxicating liquor whatever, which is used . . . as a beverage and which contains more than ½ of 1% of alcohol by volume."

Laws of 1917, c. 4, § 2 (Prohibition Act). "The words 'intoxicating liquor,' as used in this act shall be construed to mean all malt, vinous, or spirituous liquor, containing so much as ½ of 1% of alcohol by volume."

7. Maine:—Rev. Stats. 1916, c. 127, § 21 (Prohibition Act), declares "wine, ale, porter, strong beer, lager beer and all other malt liquors, and cider when kept or deposited with intent to sell the same for tippling purposes, . . . are declared intoxicating within the meaning of this chapter."

State v. *Frederickson*, 101 Maine, 37, holds that cider comes within the act whether or not it is in fact intoxicating.

State v. *Piche*, 98 Maine, 348, holds that in case of a liquor not enumerated the jury must find the question of intoxicating quality.

Laws of 1919, c. 235, § 21, prohibits "as well as any beverage containing a percentage of alcohol which by federal enactment or by decision of the Supreme Court of the United States, now or hereafter declared, renders a beverage intoxicating."

8. Maryland:—Laws of 1917, Extra Session, c. 13, § 1 (Prohibition in Prince George's County). "Malt liquors shall be construed to embrace porter, ale, beer and all malt or brewed drinks whether intoxicating or not containing as much as ½ of 1% of alcohol by volume; and that the words 'intoxicating liquors' . . . shall . . . embrace

its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a

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both spirituous liquors and malt liquors and . . . all liquid mixtures, . . . containing so much as ½ of 1% of alcohol by volume." See also Note *c* (9), *supra*, 286, and Note *h*, *infra*, 296.

9. Minnesota:—Gen. Stats. 1913, § 3188, and Gen. Stats., Suppl. 1917, § 3161, provide that "the terms 'intoxicating liquor' and 'liquor' . . . shall include distilled, fermented, spirituous, vinous, and malt liquor."

State v. *Gill*, 89 Minnesota, 502, held that only those malt liquors which were intoxicating were within the meaning of the act.

Laws of 1919, c. 455, p. 537 (Prohibition). "'Intoxicating liquor' and 'liquor' shall include and mean ethyl alcohol and any kind of distilled, fermented, spirituous, vinous, or malt liquor or liquid of any kind potable as a beverage, whenever any of said liquors or liquids contain ½ of 1% or more of alcohol by volume."

10. Missouri:—Rev. Stats., 1909, § 7243. "If a majority of the votes . . . shall be 'against the sale of intoxicating liquors,' it shall be unlawful for any person . . . [to sell] . . . any kind of intoxicating liquors or beverage containing alcohol in any quantity whatever."

State v. *Gamma*, 149 Mo. App. 694; *State* v. *Burk*, 151 Mo. App. 188; *State* v. *Wills*, 154 Mo. App. 605.

Laws of 1919, c. —, § 15. "The phrase 'intoxicating liquor' or 'intoxicating liquors' whenever used in this act shall be construed to mean and include any distilled, malt, spirituous, vinous, fermented, or alcoholic liquors, all alcoholic liquids . . . which contain ½ of 1% of alcohol by volume . . . ; *Provided, however*, that when the above mentioned phrases . . . are defined in the laws of the United States, then such definition of Congress shall supersede and take the place of the definition . . . in this section."

11. Nebraska:—Cobbey's Compiled Stats. 1907, § 7161, forbids the sale of "malt, spirituous, or vinous liquors or any intoxicating drinks" without a license.

Luther v. *State*, 83 Nebraska, 455, holds that all malt liquors fall within the meaning of the statute whether or not they are intoxicating.

Laws of 1917, c. 187, § 1 (Prohibition). "'Intoxicating liquors' . . . embrace all malt, fermented, vinous, or spirituous liquors, wine, ale, porter, beer, or any intoxicating drink . . . and all

purpose within the admitted power of the Government." (P. 201.) "It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intox-

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malt or brewed drinks and all mixtures . . . which will produce intoxication, and in addition thereto such liquors of a different character and not hereinbefore enumerated capable of use as a beverage containing over ½ of 1% of alcohol by volume."

12. Nevada:—Laws of 1919, c. 1, § 1 (Prohibition). "The words 'liquors' . . . shall embrace all malt, vinous, or spirituous liquors, wine, porter, ale, beer, or any other intoxicating drink . . . , and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this act . . . and all beverages containing so much as ½ of 1% of alcohol by volume, shall be deemed spirituous liquors."

State v. *Reno Brewing Co.*, 42 Nevada, 397.

13. Oklahoma:—Sess. Laws of 1913, c. 26, § 6, and Sess. Laws of 1917, c. 186 (Prohibition), both define intoxicating liquors as "spirituous, vinous, fermented or malt liquors . . . or any liquors which contain as much as ½ of 1% of alcohol by volume."

Estes v. *State*, 13 Okla. Crim. Rep. 604, held that the State to secure conviction for violation of the act must prove either that the liquor contained more than ½ of 1% of alcohol or that it was in fact intoxicating.

14. Oregon:—Laws of 1905, c. 2 (Local Option), used only the term "intoxicating liquors."

State v. *Carmody*, 50 Oregon, 1, held that the court will judicially recognize that "beer" is intoxicating in an indictment for selling "intoxicating liquors."

Laws of 1915, c. 141, § 2, p. 151. "'Intoxicating liquors' . . . embrace all spirituous, malt, vinous, fermented, or other intoxicating liquors, and all mixtures . . . which contain in excess of ½ of 1% of alcohol by volume shall be deemed to be embraced within the term independently of any other test of their intoxicating character."

15. Tennessee:—Acts of 1917, c. 4, p. 6 (Ann. Code, 1918, § 6798a34). Clubs, etc., may not have on their premises any liquor "containing more than ½ of 1% of alcohol."

16. Utah:—Laws of 1911, c. 106, § 2; Laws of 1913, c. 81, § 2 (License Laws), "any spirituous, vinous, fermented or malt liquor that may be used as a beverage and produce intoxication."

Laws of 1917, c. 2, § 2 (Prohibition). "'Liquors' . . . em-

icants. It prohibited, among other things, the sale of 'malt liquors.' In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the en-

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brace all fermented, malt, vinous, or spirituous liquors, alcohol, wine, porter, ale, beer, absinthe or any other intoxicating drink . . . and all malt or brewed drinks; and all liquids . . . which will produce intoxication; . . . and all beverages containing in excess of ½ of 1% of alcohol by volume."

17. Virginia:—Code of 1887, § 587 (Local Option), "any wine, spirituous or malt liquors, or any mixture thereof."

Savage v. *Commonwealth*, 84 Virginia, 582, and 619, held that a sale of "ginger extract" in order to be illegal requires the proof that the extract is intoxicating.

Acts of 1916, c. 146, § 1, p. 216, "ardent spirits . . . embrace alcohol, brandy, whisky, rum, gin, wine, porter, ale, beer, all malt liquors, absinthe, and all compounds . . . ; and all beverages containing more than ½ of 1% of alcohol by volume."

18. West Virginia:—Code, c. 32, § 1, as amended by Acts of 1877, c. 107, prohibits the sale of "spirituous liquors, wine, porter, ale, beer, or any drink of a like nature . . . and all mixtures . . . known as 'bitters' . . . which will produce intoxication . . . shall be deemed intoxicating liquors." See *State* v. *Oliver*, 26 W. Va. 422, 427.

Code of 1906, c. 32, § 1, is substantially the same.

State v. *Henry*, 74 W. Va. 72, on indictment for selling "intoxicating liquors" held that evidence of sale of "bevo" containing 1.31% of alcohol sufficient to sustain a conviction.

Acts of 1913, c. 13, § 1. "'Liquors' . . . embrace all malt, vinous, or spirituous liquors, wine, porter, ale, beer, or any other intoxicating drink . . . ; and all malt or brewed drinks whether intoxicating or not shall be deemed malt liquors . . . and all beverages containing so much as ½ of 1% of alcohol by volume."

NOTE (*e*):—

1. California:—Stats. 1911, c. 351, § 21 (Local Option and License). "'Alcoholic liquors' . . . include spirituous, vinous and malt liquors, and any other liquor . . . which contains 1%" of alcohol or more.

People v. *Strickler*, 25 Cal. App. 60, held that the clause "and any other liquor which shall contain 1% of alcohol or more" modified the

deavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise." (P. 204.) "The State,

enumerated liquors, so that a malt liquor containing less than 1% of alcohol and not intoxicating did not fall within the act.

2. Massachusetts:—Rev. Laws, 1902, c. 100, § 2 (Local Option and License). "Ale, porter, strong beer, lager beer, cider, all wines, any beverage which contains more than 1% of alcohol by volume . . . shall be deemed to be intoxicating."

Commonwealth v. *McGrath*, 185 Massachusetts, 1, held that cider fell within the act whether it contained 1% of alcohol or was intoxicating or neither.

Commonwealth v. *Blos*, 116 Massachusetts, 56. held that a liquor not enumerated in the statute is not prohibited unless it falls within the general definition which is a question for the jury.

Suppl. to Rev. Laws, 1908, c. 100, § 1, retains the same definition.

3. New Hampshire:—Gen. Laws, 1878, c. 109, § 15, restricted the sale of "lager beer or other malt liquors."

State v. *Thornton*, 63 N. H. 114; act includes all malt liquors.

Suppl. to Pub. Stat. and Sess. Laws, 1901–1913, p. 7, defines intoxicating liquors as "all distilled liquors or rectified spirits; vinous, fermented, brewed and malt liquors; and any beverage . . . containing more than 1% of alcohol by volume."

Laws of 1917, c. 147, § 60 (Prohibition). "By the words spirit, liquor, spirituous liquor, intoxicating liquor [is meant] all distilled liquors, or rectified spirits; vinous, fermented, brewed and malt liquors; and any beverage . . . containing more than 1% of alcohol, by volume."

4. South Carolina:—Rev. Stats. 1893, Crim. Stats., § 437; Code, 1902, Crim. Code, § 555; Code, 1912, Crim. Code, § 794, prohibit any spirituous, malt, vinous, fermented, brewed or other liquors and beverages, or any compound or mixture thereof which contain alcohol.

Acts of 1917, No. 94, prohibits "any spirituous, malt, vinous, fermented, brewed, or other liquors and beverages, or any compound or mixture thereof which contains alcohol in excess of 1%."

5. Vermont:—Rev. Laws, 1880, § 3800, prohibited the sale of cider at places of amusement. See *State* v. *Spaulding*, 61 Vt. 505.

Laws of 1902, No. 90, § 1, p. 94 (Gen. Laws, 1917, § 6452). "'Intoxicating liquors' . . . shall mean ale, porter, beer, lager beer,

within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent

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cider, all wines, any beverage which contains more than 1% of alcohol by volume."

6. Wyoming:—Compiled Stats., 1910, § 2838. "Any person who shall sell . . . any liquors, either spirituous, vinous, fermented, or malt, without a license, etc."

Sess. Laws of 1919, c. 25, § 2 (Prohibition). "'Intoxicating liquor' . . . include any distilled, malt, spirituous, vinous, fermented, or alcoholic liquor and all alcoholic liquids . . . capable of being used as a beverage, which shall contain more than 1% of alcohol."

NOTE (*f*):—

North Dakota:—Rev. Code, 1895, § 7598, contains a proviso to the effect that fermented and alcoholic liquors containing less than 2% of alcohol by volume shall not be deemed to be intoxicating.

Laws of 1897, c. 65, § 10. "Courts will take judicial notice that beer is a malt liquor and intoxicating." See *State* v. *Currie*, 8 N. Dak. 545.

Rev. Code, 1899, § 7598, prohibits "all spirituous, malt, vinous, fermented, or other intoxicating liquors or mixtures thereof . . . that will produce intoxication, or any liquors . . . sold . . . as a beverage and which shall contain . . . methyl alcohol, . . . amyl alcohol, etc."

State v. *Virgo*, 14 N. Dak. 293 (1905), held that the act only applied to such liquors as were in fact intoxicating.

Laws of 1909, c. 187, p. 277. Intoxicating liquors include alcohol, brandy, rum, beer, ale, porter, wine, and hard cider, also all spirituous, malt, etc., liquors, which will produce intoxication in any degree; or any mixture of such or any kind of beverage whatsoever which while preserving the alcoholic principle or any other intoxicating quality may be used as a beverage and may become a substitute for the ordinary intoxicating beverages.

State v. *Fargo Bottling Works*, 19 N. Dak. 397, held that "Purity Malt" containing 1.75% of alcohol "preserved the alcoholic principle" and whether or not it was intoxicating it might not lawfully be sold.

NOTE (*g*):—

Montana:—Laws of 1917, c. 143, § 2. "'Intoxicating liquors'

beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power." (P. 205.)

. . . include whisky, brandy, gin, rum, wine, ale, and spirituous, vinous, fermented, or malt liquors or liquid . . . which contain as much as 2% of alcohol by volume and is capable of being used as a beverage."

State v. *Centennial Brewing Co.*, 55 Montana, 500, holds specifically mentioned liquors prohibited regardless of alcoholic content.

NOTE (h):—

Rhode Island:—Pub. Laws of 1887, c. 634, § 2. "'Intoxicating liquors' . . . include wine, rum or other strong, or malt liquors, or any liquor or mixture which shall contain more than 2% by weight of alcohol" and this is not to be construed to permit the sale of liquors containing less than 2% if intoxicating.

Public Laws, 1919, c. 1740, § 1 (amending Gen. Laws, c. 123, § 1). "'Non-intoxicating beverages' as used in this act, includes and means all rectified spirits, wines, fermented and malt liquors which contain one percentum and not more than four percentum by weight of alcohol.

"Sec. 2. No person shall manufacture or sell or suffer to be manufactured or sold, or keep or suffer to be kept on his premises or possession or under his charge for the purposes of sale and delivery, any non-intoxicating beverages, unless as hereinafter provided."

"Sec. 5. The electors of the several cities and towns . . . shall . . . cast their ballots for or against the granting of licenses for the sale of non-intoxicating beverages pursuant to this act. . . ."

Maryland:—Laws of 1918, c. 219, p. 580 (prohibiting at night the sale of intoxicating liquors to be carried away from the place of sale). Expressly excludes from the operation of the act "malt liquors containing less than 4% of alcohol by weight."

This provision, however, is not attempting to make a classification of intoxicating liquors. For laws of this State which do that see Note *c*, (9) *supra*, 286, and note *d*, (8) *supra*, 290.

NOTE (i):—

1. Kentucky:—Statutes of 1903, § 2554, as amended by Laws of 1906, c. 21, forbids the sale in dry territory of "spirituous, vinous or malt liquors."

City of Bowling Green v. *McMullen*, 134 Kentucky, 742, held that the liquors named must be intoxicating in fact to be forbidden by the act.

That the Federal Government would, in attempting to enforce a prohibitory law, be confronted with difficulties similar to those encountered by the States is obvious; and both this experience of the States and the need of the Federal Government of legislation defining intoxicating liquors as was done in the Volstead Act were clearly set forth in the reports of the House Committee on the Judiciary in reporting the bill to the 65th Congress, 3d session, Report 1143, February 26, 1919, and to the 66th Congress, 1st session, Report 91, June 30, 1919. Furthermore, recent experience of the military forces had shown the necessity

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2. Texas:—Rev. Stats. 1895, Art. 5060a, taxes the selling of "spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication."

Ex parte Gray, 83 S. W. Rep. 828; *Reisenberg* v. *State*, 84 S. W. Rep. 585, held that non-intoxicating malt beverages may be sold without a license.

Gen. Laws, 1918, c. 24 (Prohibition), uses the same terms as the older statute and is cumulative, so presumably it has the same meaning.

3. Louisiana:—See Note *c* (8) *supra*, 286. The test of 2% applies only to near-beer. Presumably a vinous liquor must be proved intoxicating in fact under the decisions.

Note (*j*):—

1. New Jersey:—Laws of 1918, c. 2, § 1 (Local Option). "The term 'intoxicating liquor' . . . shall mean any spirituous, vinous, malt, brewed, or any other intoxicating liquor."

No interpretations.

2. North Carolina:—Sp. Sess. 1908, c. 71, § 1. Prohibits the sale of "any spirituous, vinous, fermented, or malt liquors, or intoxicating bitters."

Pub. Laws, 1909, c. 438, Schedule B, §§ 26 and 63, imposed a license tax on the sale of "near-beer or any drinks containing ½ of 1% alcohol or more."

Parker v. *Griffith*, 151 N. Car. 600; *State* v. *Danenberg*, 151 N. Car. 718, held that the sale of near-beer containing 1½% of alcohol was lawful.

3. Pennsylvania:—No definition.

Note (*k*):—

See Note *b*, *supra*, 283.

of fixing a definite alcoholic test for the purpose of administering the limited prohibitory law included in the Selective Service Act of May 18, 1917, c. 15, § 12, 40 Stat. 76, 82.[l] And the Attorney General, calling attention specifically to the claim made in respect to the 2.75 per cent. beer, had pointed out to Congress that definition of intoxicating liquor by fixed standards was essential to effective enforcement of the prohibition law.[m] It is there-

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NOTE (*l*):—

That statute made it "unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform." The Judge Advocate General having been applied to for an opinion concerning its administration advised that: In matters of military inquiry, the War Department regards a beverage that contains 1.4% of alcohol as intoxicating liquor within the meaning of § 12 of the Selective Service Act of May 18, 1917, and the regulations of the President and the Secretary of War made thereunder; whether beverages are intoxicating liquors . . . in prosecution of civilians is a question for the civil courts. (Opinions of Judge Advocate General, 250. December 4, 1918—Digest of 1918, p. 360.) See also opinion of March 3, 1919—Digest of 1919, p. 289.

NOTE (*m*):—

Referring to the proposed definition: "I do not think the wisdom of such action on the part of Congress admits of doubt. It goes without saying, I think, that if a law merely prohibits intoxicating liquors and leaves to the jury in each case, from the evidence produced, to determine whether the liquor in question is, in fact, intoxicating or not, its efficient and uniform administration will be impossible. The term 'intoxicating' is too indefinite and uncertain to produce anything like uniform results in such trials. Of course, there are certain liquors so generally known to be intoxicating that any court would take judicial notice of this fact. But in the absence of a definition by Congress there will be innumerable beverages as to which the claim will be made that they do not contain enough alcohol to render them intoxicating. These contentions will produce endless confusion and uncertainty. These, I think, are substantially the reasons why Congress should itself provide a definition.

"The importance of this matter has been very much emphasized by our present efforts to enforce the war prohibition act. The claim is being made that beer containing as much as 2¾ per cent. of alcohol is

fore clear both that Congress might reasonably have considered some legislative definition of intoxicating liquor to be essential to effective enforcement of prohibition and also that the definition provided by the Volstead Act was not an arbitrary one.

Plaintiff's argument is equivalent to saying that the war power of Congress to prohibit the manufacture and sale of intoxicating liquors does not extend to the adoption of such means to this end as in its judgment are necessary to the effective administration of the law. The contention appears to be, that since the power to prohibit the manufacture and sale of intoxicating liquors is not expressly granted to Congress, but is a power implied under § 8 of Article I of the Constitution, which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" powers expressly enumerated, the power to prohibit non-intoxicants would be merely an incident of the power to prohibit intoxicants; and that it cannot be held to exist, because one implied power may not be grafted upon another implied power. This argument is a mere matter of words. The police power of a State over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors supported by a separate implied power to prohibit kindred non-intoxicating liquors so far as necessary to make the prohibition of intoxicants effective; it is a single broad power to make such laws, by way of prohibition, as may be required to effectively suppress the traffic in intoxicating liquors. Likewise the im-

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not intoxicating. And if this must be made a question of fact to be decided by each jury, but little in the way of practical results can be expected. I am, however, most earnestly insisting that, in view of the rulings for many years by the Internal Revenue Department, Congress meant when it used the word 'beer' a beverage of the class generally known as beer if it contained as much as one half of 1 per cent. of alcohol." Letter of Attorney General to Senator Morris Shepherd, July 29, 1919, read in Senate, September 5, 1919, 58 Cong. Rec. 5185.

plied war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors but will effectually prevent their sale. Furthermore, as stated in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *ante*, 156, while discussing the implied power to prohibit the sale of intoxicating liquors: "When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power . . ."

The distinction sought to be made by plaintiff between the scope or incidents of an express power and those of an implied power has no basis in reason or authority. Thus, the Constitution confers upon Congress the express power "to establish post offices and post roads" (Article I, § 8, clause 7). From this is implied the power to acquire land for post offices in the several States, *Battle* v. *United States*, 209 U. S. 36; and as an incident of this implied power to acquire land, the further power is implied to take it by right of eminent domain. *Kohl* v. *United States*, 91 U. S. 367. Likewise, the Constitution confers by clause 3 the express power "to regulate commerce . . . among the several States"; but there is implied for this purpose also the power to grant to individuals franchises to construct and operate railroads from State to State. *California* v. *Pacific R. R. Co.*, 127 U. S. 1, 39. Incidental to this implied power to construct or authorize the construction of a railroad—is the further implied power to regulate the relations of the railroad with its employees, *Second Employers' Liability Cases*, 223 U. S. 1, 47; to require safety appliances upon cars, even when used in intrastate commerce, *Southern Ry. Co.* v. *United States*, 222 U. S. 20; and to regulate freight rates even to the extent of affecting intrastate rates, *American Express Co.* v. *Caldwell*, 244 U. S. 617. Whether it be for purposes of national defense, or for the purpose

of establishing post offices and post roads or for the purpose of regulating commerce among the several States Congress has the power "to make all laws which shall be necessary and proper for carrying into execution" the duty so reposed in the Federal Government. While this is a Government of enumerated powers it has full attributes of sovereignty within the limits of those powers. *In re Debs*, 158 U. S. 564. Some confusion of thought might perhaps have been avoided, if, instead of distinguishing between powers by the terms express and implied, the terms specific and general had been used. For the power conferred by clause 18 of § 8 "to make all laws which shall be necessary and proper for carrying into execution" powers specifically enumerated is also an express power. Since Congress has power to increase war efficiency by prohibiting the liquor traffic, no reason appears why it should be denied the power to make its prohibition effective.

Second: Does the fact that Title I of the Volstead Act took effect upon its passage render § 1 invalid as against the plaintiff? Prohibition of the manufacture of malt liquors with alcoholic content of one-half of one per cent. or more is permissible only because, in the opinion of Congress, the war emergency demands it. If, in its opinion, the particular emergency demands the immediate discontinuance of the traffic Congress must have the power to require such discontinuance. To limit the power of Congress so that it may require discontinuance only after the lapse of a reasonable time from the passage of the act would seriously restrict it in the exercise of the war powers. Hardship resulting from making an act take effect upon its passage is a frequent incident of permissible legislation; but whether it shall be imposed rests wholly in the discretion of the law-making body. That the prohibition of the manufacture of non-intoxicating beer, if permissible at all, may be made to take effect immediately follows necessarily from the principle acted upon in *Mugler* v. *Kansas*, 123

U. S. 623, 669, since the incidents attending the exercise by Congress of the war power to prohibit the liquor traffic are the same as those that attend the States' prohibition under the police power. In the *Mugler Case*, also, the breweries were erected at a time when the State did not forbid the manufacture of malt liquors; and there it was alleged that the prohibition, which became effective almost immediately, would reduce the value of one of the breweries by three-fourths and would render the other of little value. Here, as there, the loss resulting to the plaintiff from inability to use the property for brewery purposes, is an incident of the peculiar nature of the property and of the war need which, we must assume, demanded that the discontinuance of use be immediate. Plaintiff cannot complain because a discontinuance later would have caused him a smaller loss. This, indeed, appears to be conceded so far as concerns the brewery and appurtenances. The objection on the ground that the prohibition takes effect imdiately is confined to the prohibition of the sale of the beer on hand at the time of the passage of the act. But as to that also we cannot say that the action of Congress was unreasonable or arbitrary.

Plaintiff contends however that even if immediate prohibition of the sale of its non-intoxicating beer is within the war power, this can be legally effected, only provided compensation is made; and it calls attention to the fact that in *Barbour* v. *Georgia*, 249 U. S. 454, 459, following some earlier cases, the question was reserved whether, under the police power, the States could prohibit the sale of liquor acquired before the enactment of the statute. It should, however, be noted that, among the judgments affirmed in the *Mugler Case*, was one for violation of the act by selling beer acquired before its enactment (see pp. 625, 627); and that it was assumed without discussion that the same rule applied to the brewery and its product (p. 669). But we are not required to determine here the limits

in this respect of the police power of the States; nor whether the principle is applicable here under which the Federal Government has been declared to be free from liability to an owner, "for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary to their safety and efficiency," *United States* v. *Pacific Railroad*, 120 U. S. 227, 239; in analogy to that by which States are exempt from liability for the demolition of a house in the path of a conflagration, see *Lawton* v. *Steele*, 152 U. S. 133, 136; or for garbage of value taken, *Reduction Co.* v. *Sanitary Works*, 199 U. S. 306; *Gardner* v. *Michigan*, 199 U. S. 325; or for unwholesome food of value destroyed, *North American Storage Co.* v. *Chicago*, 211 U. S. 306; *Adams* v. *Milwaukee*, 228 U. S. 572, 584; for the preservation of the public health. Here, as in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *supra*, there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use.

It is urged that the act is particularly oppressive in respect to the beer on hand, because the plaintiff was engaged in manufacturing and selling a non-intoxicating beverage expressly authorized by the President in his proclamation of December 8, 1917, and prohibited by him later, only when conservation of all the food products of the country became necessary. The facts afford no basis on which to rest the claim of an equity in the plaintiff's favor. The specific permission from the President to manufacture 2.75 per cent. beer was not on the ground that such beer was non-intoxicating; nor was it a declaration by him that this beer was in fact non-intoxicating. The permission extended to all "ale and porter" which, everyone knows, are intoxicating liquors." This permission to

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NOTE (*n*):—

Webster defines ale as: "An intoxicating liquor made from an infusion of malt by fermentation and the addition of a bitter, usually

make 2.75 per cent. beer was withdrawn December 1, 1918, under proclamation of September 16, 1918; and no permission to manufacture specifically 2.75 per cent. beer was ever thereafter given by the President. His later proclamation (March 4, 1919) merely limited the prohibition of the use of foodstuffs to use in the production of "intoxicating liquors." Whether 2.75 per cent. beer was intoxicating was thus left by the President not only without a decision but without even an intimation. The statement of plaintiff that the 2.75 per cent. beer on hand was manufactured under permission of the President is wholly unfounded. It was not until July 1, 1919, when the War-Time Prohibition Act became operative in this respect, that there was any prohibition of the sale of any liquors. So far as appears, all the beer which the plaintiff had on hand at the time of the passage of the Volstead Act was manufactured by the plaintiff long after the President had ceased to have any authority to forbid or to permit.

Decree affirmed.

MR. JUSTICE McREYNOLDS, with whom concurred MR. JUSTICE DAY, and MR. JUSTICE VAN DEVANTER, dissenting.

I cannot accept either the conclusion announced by the court or the reasons advanced to uphold it. The importance of the principles involved impels a dissent.

We are not now primarily concerned with the wisdom or validity of general legislation concerning liquors, nor with the intoxicating qualities of beer, nor with measures taken by a State under its inherent and wide general powers to provide for public safety and welfare. Our problem concerns the power of Congress and rights of the citizen after a declaration of war, but when active

hops;" and porter as: "A malt liquor, of dark color and moderately bitter taste, possessing tonic and intoxicating qualities."

hostilities have ended and demobilization has been completed.

The Government freely admits, since the present cause stands upon motion to dismiss a bill which plainly alleges that the beer in question is non-intoxicating, we must accept that allegation as true and beyond controversy. In *United States* v. *Standard Brewery*, decided this day, *ante*, 210, we rule in effect that for many months prior to the Volstead Act, passed October 28, 1919, no law of the United States forbade the production or sale of non-intoxicating malt liquors. And so the question for decision here distinctly presented, is this—Did Congress have power on October 28, 1919, directly and instantly to prohibit the sale of a non-intoxicating beverage, theretofore lawfully produced and which until then could have been lawfully vended, without making any provision for compensation to the owner?

The Federal Government has only those powers granted by the Constitution. The Eighteenth Amendment not having become effective, it has no general power to prohibit the manufacture or sale of liquors. But by positive grant Congress has been empowered: "To declare war," "to raise and support armies," "to provide and maintain a navy," "to make rules for the government and regulation of the land and naval forces," "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers"; and to these it is attempted to trace the asserted power to prohibit sale of complainant's beer. (See concerning implied powers, Cooley's Principles of Constitutional Law, 105; Story on the Constitution, 4th ed., § 1243.)

The argument runs—This court has held in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *ante*, 146, that under a power implied because necessary and proper to carry into execution the above named powers relating to war, in October, 1919, Congress could prohibit the sale

of intoxicating liquors. In order to make such a prohibition effective the sale of non-intoxicating beer must be forbidden. Wherefore, from the implied power to prohibit intoxicants the further power to prohibit this non-intoxicant must be implied.

The query at once arises: If all this be true, why may not the second implied power engender a third under which Congress may forbid the planting of barley or hops, the manufacture of bottles or kegs, etc., etc.? The mischievous consequences of such reasoning were long ago pointed out in *Kidd* v. *Pearson*, 128 U. S. 1, 21, where, replying to a suggestion that under the expressly granted power to regulate commerce, Congress might control related matters, it was said:

"The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?"

For sixty years *Ex parte Milligan*, 4 Wall. 2, 120, 125, has been regarded as a splendid exemplification of the protection which this court must extend in time of war to rights guaranteed by the Constitution, and also as decisive of its power to ascertain whether actual military necessity justifies interference with such rights. The doctrines then clearly—I may add, courageously—announced, conflict with the novel and hurtful theory now promulgated. A few pertinent quotations from the opinion will accentuate the gravity of the present ruling.

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and

good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

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"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged

at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*."

By considering the circumstances existing when the War-Time Prohibition Act was challenged, in order to reach the conclusion announced in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, *supra*, this court asserted its right to determine the relationship between such an enactment and the conduct of war; the decision there really turned upon an appreciation of the facts. And that the implied power to enact such a prohibitive statute does not spring from a mere technical state of war but depends upon some existing necessity directly related to actual warfare, was recognized. Treating that opinion as though it asserted the existence of a general power delegated to Congress to prohibit intoxicants, certain cases which declare our inability to interfere with a State in the exercise of its police power (*Purity Extract Co.* v. *Lynch*, 226 U. S. 192; *Silz* v. *Hesterberg*, 211 U. S. 31, etc.) are now cited, and it is said they afford authority for upholding the challenged statute. But those cases are essentially different from the present one, both as to facts and applicable principles; the power exercised by the States was inherent, ever present, limited only by the Fourteenth Amendment, and there was no arbitrary application of it; the power of Congress recognized in the *Hamilton Case*, and here relied upon must be inferred from others expressly granted and should be restricted, as it always has been heretofore, to actual necessities consequent upon war. It can only support a measure directly relating to such necessities and only so long as the relationship continues. Whether these

essentials existed when a measure was enacted or challenged, presents a question for the courts; and, accordingly, we must come to this ultimate inquiry:—Can it be truthfully said, in view of the well-known facts existing on October 28, 1919, that general prohibition immediately after that day of the sale of non-intoxicating beer theretofore lawfully manufactured, could afford any direct and appreciable aid in respect of the war declared against Germany and Austria?

What were the outstanding circumstances? During the nineteen months—April, 1917, to November, 1918—when active hostilities were being carried on, and for almost a year thereafter, Congress found no exigency requiring it to prohibit sales of non-intoxicating beers. The armistice was signed and actual hostilities terminated November 11, 1918. Our military and naval forces, with very few exceptions, had returned and demobilization had been completed. The production of war material and supplies had ceased long before and huge quantities of those on hand had been sold. The President had solemnly declared, "The war thus comes to an end; for having accepted these terms of armistice, it will be impossible for the German command to renew it." Also—"That the object of the war is attained." "The quiet of peace and tranquility of settled hopes has descended upon us." July 10, 1919, he announced, "The war ended in November, eight months ago"; and in a message dated October 27, 1919, he declared that war emergencies which might have called for prohibition "have been satisfied in the demobilization of the army and navy." Food supplies were abundant, and there is no pretense that the enactment under consideration was intended to preserve them. Finally, the statute itself contains no declaration that prohibition of non-intoxicants was regarded as in any way essential to the proper conduct or conclusion of the war or to restoration of peace.

Giving consideration to this state of affairs, I can see no reasonable relationship between the war declared in 1917, or the demobilization following (both of which in essence if not by formal announcement terminated before October, 1919) or restoration of peace (whose quiet had already descended upon us) and destruction of the value of complainant's beverage, solemnly admitted in this record to be non-intoxicating and which it manufactured, held and desired to sell in strict compliance with the laws of New York. Nor can I discover any substantial ground for holding that such destruction could probably aid in an appreciable way the enforcement of any prohibition law then within the competency of Congress to enact. It is not enough merely to assert such a probability; it must arise from the facts.

Moreover, well settled rights of the individual in harmless property and powers carefully reserved to the States, ought not to be abridged or destroyed by mere argumentation based upon supposed analogies. The Constitution should be interpreted in view of the spirit which pervades it and always with a steadfast purpose to give complete effect to every part according to the true intendment—none should suffer emasculation by any strained or unnatural construction. And these solemn words we may neither forget nor ignore—"Nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

MR. JUSTICE CLARKE also dissents.